(21,139.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 140.

SOUTHERN RAILWAY COMPANY, PETITIONER,

vs.

MRS. JOSEPHINE KING.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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a TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Fifth Circuit.

No. 1634.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
versus
Mrs. JOSEPHINE KING, Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Georgia.

[Original record filed January 11, 1907.]
U. S. Circuit Court of Appeals. Filed Feb. 19, 1907.
CHARLES H. LEDNUM, *Clerk.*

1 TRANSCRIPT OF RECORD FROM SUPERIOR COURT OF HABERSHAM COUNTY, GEORGIA.

GEORGIA,
Habersham County:

To the Superior Court of said County:

Mrs. Josephine King brings her petition against the Southern Railway Company of said county, and shows:

Par. 1.

That the said company has injured and damaged your petitioner in the sum of ten thousand dollars, by reason of the following facts: that said railroad company, a railroad corporation, is and was on the 20th day of September, 1903, operating a railroad in said county, and having agents and a line of track in said county.

Par. 2.

That on said day, your petitioner together with her minor daughter Inez, about fourteen years old, and her husband, A. O. King, were all in a buggy drawn by one mule, traveling on and over a public road of said county, and came to the place where said public road is crossed by said railroad at what is known as the Maggie Wade crossing in said county, and that while they were thus traveling on said public road and crossing said railroad, they and the buggy in which they were riding was struck and injured by a locomotive and cars of said railway company, and by the running of the same on said railway, said cars and locomotive as made up constituted what is known as train number thirty-nine.

Par. 3.

Your petitioner shows that at the time of said injuries, when your petitioner, her husband and her said daughter, approached the track of the said defendant, there were trees, bushes and a high bank, between said public road and the track of the defendant, which entirely and completely obstructed the view of the defendant's track, and your petitioner, her husband and her said daughter, could not and did not see defendant's track and the approaching train, that petitioner, her said husband and said daughter did not see, nor did they hear the train until they actually drove upon the track,
2 and when upon the track they heard one quick, short blow of the whistle, and were instantly knocked off the track by said train; that said train at the time was — at the rate of fifty miles an hour, and did not blow for said crossing and did not ring the bell.

Par. 4.

Your petitioner shows that her husband, A. O. King, was then and there struck by said locomotive and cars, and by the running of the same on said railroad, and was then and there instantly killed, in the manner and form aforesaid.

Par. 5.

Petitioner shows that her said husband, A. O. King, and your petitioner, were at the time exercising all ordinary care and diligence, and in no way contributed to his injuries and death.

Par. 6.

That the injuries to the said A. O. King and his death resulted from the negligent manner in which said locomotive and cars were being run and operated at the time by said company, and petitioner's husband's death was the result of the grossest carelessness and negligence of said defendant, its agents and servants, in the running of said train at such a dangerous rate of speed over a public crossing, where a large number of people were continuously crossing said track, without giving any signal whatever.

Par. 7.

That at the time of the death of petitioner's husband he was earning about five hundred dollars per annum, was sixty years old, was in good health, and had a reasonable expectancy of twenty years of life.

Par. 8.

Petitioner shows that she was put to a great expense for funeral and burial expenses for her said husband, to-wit: the *the* sum of one hundred dollars.

3

Par. 9.

Petitioner shows that the value of her said husband's life was ten thousand dollars.

Par. 10.

Petitioner shows that the value of her said buggy was one hundred dollars, and that the same was totally destroyed.

Wherefore petitioner says she has been damaged as aforesaid by said defendant in the sum of ten thousand dollars, and she prays judgment against said Railway Company for said sum, that process may issue requiring the said Southern Railway Company to be and appear at the next term of the Superior Court of said County to answer your petitioner's complaint.

HOWARD THOMPSON,
Petitioner's Att'y.

Filed in office February 16th, 1904.

J. A. ERWIN, *C. S. C.*

STATE OF GEORGIA,
Habersham County:

To the Sheriff of said County, Greeting:

Mrs. JOSEPHINE KING
versus
SOUTHERN RAILWAY COMPANY.

Complaint.

The defendants, the Southern Railway Company, — hereby required, personally, or by attorney, to be and appear at the next Superior Court, to be held in and for said County, on the first Monday in March, next, then and there to answer the plaintiff's demand in an action of complaint.

Witness the Honorable J. J. Kimsey, Judge of said Court, this 16th day of Febry., 1904.

J. A. ERWIN, *Clerk.*

GEORGIA,
Habersham County:

I have this day served the Southern Railway Co., a corporation, by leaving a copy of the within petition and process with J. G. Nelms, agt., at Toccoa, Ga., this Febry. 19th, 1904.

P. F. GRANT, *Sheriff.*

4 *Petition for Removal to the Circuit Court of the United States for the Eastern Division of the Northern District of Georgia.*

In the Superior Court of Habersham County, State of Georgia.

Mrs. JOSEPHINE KING, Plaintiff,
vs.
SOUTHERN RAILWAY COMPANY, Defendant.

Your petitioner, the Southern Railway Company, respectfully shows to this Honorable Court:

1. That it is the defendant in the suit, which is of a civil nature and now pending; that said suit is brought to recover the sum of ten thousand dollars for homicide of plaintiff's husband.

2. Your petitioner further shows that the said cause was instituted and begun in the Superior Court of Habersham Co. by the said Mrs. Josephine King, the said cause being returnable to March term, and that the time required for answering or pleading to the declaration or complaint of the plaintiff under the laws of Georgia and rules of said Court has not arrived.

3. Your petitioner further shows that the cause being of a civil nature, as aforesaid, is wholly between citizens of different States. Your petitioner, who was at the time of the commencement of this suit, and still is a corporate body, corporated under the laws of Virginia, then and now a resident and citizen of the State of Virginia, and a non-resident of the State of Georgia, and plaintiff, who was and still is a citizen of Georgia, as your petitioner avers.

4. Your petitioner further shows that the controversy between your petitioner and plaintiff is monetary in character, and the sum or value involved and the controversy therein, exclusive of interest and costs, exceeds the sum and value of $2,000, and is the sum of ten thousand dollars, as aforesaid.

5. That your petitioner desires to remove this suit before the trial thereof and to remove same into the next Circuit Court of the
5 United States, to he held in the Eastern Division of the Northern District of Georgia; and your petitioner hereby brings J. W. English, of the County of Fulton, State of Georgia, as its surety, for its entering into the Circuit Court of the United States for the Eastern Division of the Northern District of Georgia, on the first day of its next session or before, a copy of the record in said suit, and for paying all costs that may be awarded by the said Circuit Court of the United States, if said Court should hold that this suit was wrongfully and improperly removed thereto; and, also, for its appearing and entering special bail in said suit, if special bail was originally required therein, and for its complying, in all respects, with the provisions of the laws of the United States in the premises, regulating the removal of causes from the State Courts.

6. And your petitioner therefore prays that the said surety and bond may be accepted; that this suit may be removed into the next Circuit Court of the United States, to be held in the Eastern Division of the Northern District of Georgia, pursuant to the statutes of the

United States in such cases made and provided, and that no further proceedings may be had therein in this Court; and your petitioner will ever pray.

7. Your petitioner further shows that its appearance, through its attorneys, to remove this suit, is a special appearance, and does not waive its objection to the jurisdiction of the Court—it being solely for the purpose of removal to said Circuit Court of the United States for the Eastern Division of the Northern District of Georgia.

JNO. J. STRICKLAND,
J. J. BOWEN,
F. BARRETT,
Petitioner's Attorneys.

STATE OF GEORGIA,
Fulton County:

Personally came before me J. S. B. Thompson, who, being duly sworn, deposes and says that he is the general agent of defendant, the Southern Railway Company, petitioner in the foregoing petition for removal; that affiant knows the contents of said petition, having read the same, and said petition is true, to his own knowledge, except as to matters therein stated to be alleged upon information and belief, and — to those matters he believes — to be true.

6 Affiant further says that he is a general officer of the defendant, the Southern Railway Company, and is the highest officer of said defendant in the State of Georgia, and is authorized to verify the foregoing petition.

J. S. B. THOMPSON.

Sworn to and subscribed before me this 3rd day of March, 1904.
[SEAL OF NOTARY.] J. L. EDWARDS,
Notary Public, Fulton County, Georgia.
Fulton County, Ga.

Bond.

In the Superior Court of Habersham County, State of Georgia.

Petition to Remove Cause to the United States Circuit Court for the Eastern Division of the Northern District of Georgia from the Superior Court of Habersham County, Ga.

MRS. JOSEPHINE KING
VS.
SOUTHERN RAILWAY COMPANY.

Know all men by these presents that we, the Southern Railway Company, as principal, and J. W. English, as surety, are held and firmly bound unto Mrs. Josephine King in the penal sum of one thousand dollars, for the payment whereof, well and truly to be made unto the said Mrs. Josephine King, her representatives and assigns,

and all others whom it may concern, we bind ourselves, our heirs, our representatives, successors and assigns, jointly and severally, by these presents.

Whereas, The Southern Railway Company has filed its petition in the Superior Court of Habersham, asking for the removal to the Circuit Court of the United States for the Eastern Division of the Northern District of Georgia, of a certain cause therein pending, wherein said Mrs. Josephine King is plaintiff and the Southern Railway Company is defendant.

Now, the conditions of the above obligations are such, that if the said Southern Railway Company shall enter into the said Circuit Court of the United States for the Eastern Division of the Northern District of Georgia, aforesaid, on the first day of its next session, or before, a copy of the record in the said suit, and shall well
7 and truly pay all costs that may be awarded by said Court, if said Court shall hold that said suit was improperly removed thereto, and shall make special bail if originally required, and shall do and perform all acts required by the laws of the United States to be done by it in the removal of said suit, as aforesaid, then this obligation to be void; otherwise to remain in full force and effect.

In testimony whereof we have hereunto set our hands and affixed our seals, this 1st day of March, 1904.

[SEAL.] SOUTHERN RAILWAY COMPANY,
By J. J. STRICKLAND, *Att'y.*
[SEAL.] J. W. ENGLISH, *Surety.*

Executed, acknowledged and subscribed before me this 1st day of March, 1904.

W. C. LANIER,
Notary Public, Fulton County, Ga.

Justification of Surety.

STATE OF GEORGIA,
Fulton County:

In person appeared before me W. C. Lanier, a notary public, in and for said county, J. W. English, who, on oath, says that he is a resident of Fulton County and said State; that he is a freeholder therein, and is worth more than one thousand dollars (over and above all exemptions and claims of every kind), subject to the foregoing execution.

J. W. ENGLISH.

Sworn to and subscribed before me this 1st day of March, 1904.
W. C. LANIER,
Notary Public, Fulton County, Ga.

8 *Entry for Minutes.*

STATE OF GEORGIA,
Habersham County:

MRS. JOSEPHINE KING, Plaintiff,
vs.
SOUTHERN RAILWAY COMPANY, Defendant.

The defendant, the Southern Railway Company, being the petitioner in the foregoing petition for the removal of the cause aforesaid, having within the time provided by law filed its petition for the removal of this cause to the Circuit Court of the United States for the Northern District of Georgia, and having at the same time offered its bond in the sum of one thousand dollars, with J. W. English, good and sufficient surety, pursuant to the statutes and conditions according to law.

Now, therefore, this Court does hereby accept and approve said bond and accept said petition, and does order that the same remain filed with the Clerk of this Court; and it is ordered that this cause be removed for trial to the next Circuit Court of the United States for the Northern District of Georgia, pursuant to the statutes of the United States, and that all proceedings of and in this Court be stayed and suspended.

By the Court:

J. J. KIMSEY, *J. S. C.*

Filed in office March 7, 1904.

J. A. ERWIN, *C. S. C.*

Clerk's Certificate.

GEORGIA,
Habersham County:

I, J. A. Erwin, Clerk of the Superior Court of Habersham County, do certify that the foregoing is a complete copy of all the record and papers in said case in my office, including the petition, process, petition to remove, affidavit, bond and order removing said case to the United States Circuit Court for the Eastern Division of the Northern District of Georgia.

Witness my official signature and seal of office, this March 22, 1904.

[SEAL.] J. A. ERWIN, *C. S. C.*

Filing: Filed in Clerk's office, March 31, 1904. O. C. Fuller, Clerk.

9 *Answer.*

In the United States Circuit Court for the Eastern Division of the Northern District of Georgia.

April Term, 1904.

No. —.

Mrs. JOSEPHINE KING
vs.
SOUTHERN RY. CO.

Removed from Habersham Superior Court.

Now comes the So. Ry. Co., the defendant in the above stated case, and answers the several paragraphs of plaintiff's petition as follows:

1. This is denied.
2. This is denied as alleged.
3. This is denied.
4. This is denied.
5. This is denied.
6. This is denied.
7. This is denied.
8. This is denied.
9. This is denied.
10. This is denied.

Of all of which defendant puts itself upon the country.

JNO. J. STRICKLAND,
Of Def't's Att'ys.

Filing: Filed in office and docketed March 31st, 1904. O. C. Fuller, Clerk.

10 *Amended Answer.*

In the Circuit Court of the United States for the Eastern Division of the Northern District of Georgia.

JOSEPHINE KING
vs.
SOUTHERN RAILWAY CO.

Suit for Damage.

Now comes the Southern Railway Company, the defendant in the above case, and, by permission of the Court first obtained, amends its answer already filed, and says that plaintiff should not recover for the following reasons:

1. To the March Term, 1904, of Habersham Superior Court, the

plaintiff, Josephine King, brought her action against this defendant for damages resulting to her, growing out of the alleged tort or negligence set up in this case; that said suit was by the same plaintiff against the same defendant, and therefore between the same parties, and all the matters set out in the present suit could have been put in issue in that case, the same being one and the same cause of action.

2. That at the September Term, 1905, of Habersham Superior Court, plaintiff obtained verdict and judgment in said case against this defendant, a copy of the proceedings in said case, including verdict being hereto attached, and made part of this answer.

3. Defendant didn't file this plea at the first time for the reason that the case had not been tried. The trial of said case having taken place in September, 1905.

All of which it stands ready to verify.

Wherefore it prays that the said former suit and judgment be adjudged and barred to this action.

JNO. J. STRICKLAND.
T. F. GREEN.

11 Habersham Supr. Court, March Term, 1904.

Mrs. JOSEPHINE KING
vs.
SOUTHERN RAILWAY COMPANY.

Original.

GEORGIA,
Habersham County:

To the Superior Court of said County:

Mrs. Josephine King brings her petition against the Southern Railway Company of said county and respectfully shows:

1.

That said company has injured and damaged your petitioner in the sum of nineteen hundred and ninety-five dollars, by reason of the following facts:

2.

That said railway is, and was on the 20th day of September, 1903, operating a railroad in said county, and having agents and a line of track in said county.

3.

That on said day your petitioner, together with her minor daughter Inez and her husband, A. O. King, were all in a buggy drawn by one mule, traveling on and over a public road of said county, and came to a place where said public road is crossed by said railroad, at *which* is known as Maggie Wade crossing in said county, and

that while they were thus on and traveling on said public road, and crossing said railroad, they were struck and injured by a locomotive and cars of said Railway Company, and by the running of the same on said railway; said cars and locomotive as made up constituting what is known as vestibule train No. 39.

4.

Your petitioner shows that at the time of said injuries, when your petitioner, her said husband and daughter, approached the track of said defendant, there were trees, bushes and a high
12 embankment between said public road and the track of said defendant, which entirely and completely obstructed the view of defendant's tracks, and your petitioner and her said husband and daughter could not see and did not see defendant's track and the approaching train; that petitioner, her said husband and daughter, did not see, nor did they hear, the train, until they actually drove upon the track; that when upon the track they heard one quick, short blow of the whistle, and were instantly knocked off of the track by said train; that said train at the time was running at the rate of fifty miles an hour, and did not blow for said crossing and did not ring any bell.

5.

Petitioner shows that the buggy in which she was traveling was struck by said locomotive and cars, and she, with said buggy, was thrown from the railroad track and thereby injured and damaged.

6.

Petitioner shows that she was crippled, bruised and wounded; that she was thrown from said buggy some thirty feet and fell upon piles of stone and the hard ground near the railroad track, striking her head with great force; that her back was seriously and permanently injured; her arms and shoulders and sides were seriously injured.

7.

Your petitioner shows that, as an immediate result of said injury, she was confined to her bed continuously for about three months; that she is now barely able to be up; that she is totally unable to do and perform her usual and ordinary work and labor about her house; that such work as she is able to do is performed with the greatest pain and suffering.

8.

Petitioner shows that at the time of said injury, she was about fifty-five years old, and was in good health; able to do all her house and kitchen work, and any and everything about her home.

13

9.

Petitioner shows that at the time of said injury she was exercising all ordinary care, diligence and prudence, and in no way contributed to the injury received by her, and that the injury that she then and there received resulted from the negligent manner in which said locomotive and cars were being run and operated at the time by said Railway Company, its agents and employees.

10.

By reason of said injury to your petitioner, her capacity to work and earn money is almost entirely destroyed; her capacity to perform the ordinary duties about her home has been seriously impaired; that prior to said injuries, she was capable of performing, and did perform, any and all kinds of labor, work and service in and about her home and upon the farm, of great value, to-wit: of the value of five hundred dollars per year; that by reason of said injuries she is now almost entirely incapacitated to do and perform any kind of said work and labor and is now a cripple for life.

11.

Petitioner shows that she has and will be compelled to expend five hundred dollars for medicine, medical treatment, nursing, etc.

12.

Petitioner shows as a consequence of her said injury, she has suffered and will always suffer the most intense pain and mental anguish.

13.

Petitioner further shows that at the time of her said injuries her husband, A. O. King, was killed; that she is now a widow and has the sole care and management of her family, consisting of herself and her minor daughter Inez, that at the said time her said daughter was crippled and injured, and is now a hopeless invalid for life; said Inez being at the time about fourteen years old.

Wherefore, petitioner says that she has been damaged as aforesaid by said defendant in the sum of nineteen hundred
14 and ninety-five dollars, and prays judgment against said Southern Railway Company for said sum. Petitioner prays process may issue requiring said Southern Railway Company to be and appear at the next term of said Court to answer your petitioner's complaint.

HOWARD THOMPSON,
Petitioner's Attorney.

Filed in office, Feb'ry 16th, 1904.

J. A. ERWIN, *C. S. C.*

STATE OF GEORGIA,
Habersham County:

To the Sheriff of said County, Greeting:

MRS. JOSEPHINE KING
vs.
SOUTHERN RAILWAY COMPANY.

Complaint.

The defendant Southern Railway Company, is hereby required, personally or by attorney, to be and appear at the next Superior Court, to be held in and for said County on the first Monday in March next, then and there to answer the plaintiff's demand in an action of complaint.

Witness the Honorable J. J. Kimsey, Judge of said Court, this 16th day Feb'ry, 1904.

J. A. ERWIN, *Clerk.*

GEORGIA,
Habersham County:

I have this day served the Southern Ry. Co., a corporation, by leaving copy of the within petition and process with J. G. Nelms, Agt., at Toccoa, Ga.

This Feb'ry 19th, 1904.

PAUL F. GRANT, *Sheriff.*

15 *Answer.*

Habersham Superior Court, March Term.

MRS. JOSEPHINE KING
vs.
SOUTHERN RAILWAY COMPANY.

Now comes the Southern Railway Company, the defendant in the above stated case, on the first day of the first term, and answers to the petition in said case, on the following grounds:

I.

Paragraphs 1, 2, 3, 4, 5, 6, 7 are denied.

II.

Defendant can neither admit nor deny paragraph 8 for the want of information.

III.

Paragraphs 9, 10, 11, 12 and 13 are denied.

Of all which defendant puts itself upon the country.

JNO. J. STRICKLAND,
J. J. BOWDEN,
FERMOR BARRETT,
Def't's Att'ys.

Indorsed: Filed in office M'ch 15th, 1904. J. A. Erwin, C. S. C.

Amendment to Declaration.

Habersham Superior Court, September Term, 1904.

JOSEPHINE KING
vs.
SOUTHERN RY. CO.

Complaint for Damages.

And now at this term of the Court comes the plaintiff in the above stated case, and, by leave of the Court first obtained,
16 amends her petition, and by way of amendment *of*, says:

That at the time petitioner, her said husband and her said daughter, Inez King, were traveling on and over said public road or highway of said county, where they had a right to be, and where in the prosecution of their journey they were obliged to go, as fully set out in her original —, she, her said husband and her said daughter were in the exercise of all ordinary care and caution in going upon and over said public railroad crossing; that neither she [nor] her said husband could have avoided the consequences to themselves at said time and place as set forth in her original petition, but that the same was caused solely by the negligence of the defendant, its agents and employees, in the running of its locomotive and cars at a dangerous and rapid speed. She was injured and damaged at what is known as the Mag Wade crossing in said county; that while in the act of crossing said railroad at said crossing, she was run upon and over by defendant's south bound train, known as local vestibule train or train No. 39, at about 2 o'clock P. M. on the 11th day of October, 1903.

That defendant was negligent in running over petitioner and injuring and damaging her in divers particulars, to-wit: That said train was running at the rate of fifty to sixty miles per hour. That said engineers and employees in charge of said train failed to blow the whistle of said locomotive at the blow post. That the engineer and employees in charge of said train failed to blow the whistle of the locomotive until it arrived at said public road. That said engineer and employees in charge of said train failed to simultaneously check and keep checking the speed of said train as it approached said crossing so as to stop in time should any person or thing be crossing said track on said public road over which your petitioner [and her] husband was then passing.

Wherefore petitioner prays that her amendment may be allowed, and when so allowed, may have all the force and effect of *this* original petition of plaintiff.

HOWARD THOMPSON,
Petitioner's Attorney.

Amendment allowed, this 15th day of September, 1904.
J. J. KIMSEY, *J. S. C.*

17 *Verdict.*

We, the jury, find for the plaintiff one thousand dollars and cost of suit.

B. F. SCOTT, *Foreman.*

Clerk's Certificate.

GEORGIA,
Habersham County:

I, J. A. Erwin, Clerk of the Superior Court in and for said county, do certify that the foregoing five pages contains a true copy of the record in the case of Josephine King vs. Southern Railway Company.

Witness my hand and seal of office, this September 30th, 1905.

[SEAL.] J. A. ERWIN,
Clerk Superior Court.

GEORGIA,
Clarke County:

You, Jno. J. Strickland, do swear that you as attorney for the Southern Railway Company, have had charge of the above case since its incipiency, and have filed all of the pleadings for the defendant. At the time of filing the original answer, the defendant did not omit the new facts of defence set out in the amended answer for the purpose of delay, and the amended answer is not now offered for the purpose of delay. So help you God.

JNO. J. STRICKLAND.

Sworn to and subscribed before me this April 24th, 1906.

H. H. SIMMONS,
Deputy Clerk.

The demurrer to the within amendment is hereby sustained. This Apl. 27, 190–.

WM. T. NEWMAN,
U. S. Judge.

Filed in clerk's office 27th day of Apl., 1906.

O. C. FULLER, *Clerk.*

Filing: Amended answer. Filed in office and docketed April 24, 1906. W. C. Carter, Dep. Clerk.

18 *Consent Order that Cases Nos.* 21 *and* 26 *be Tried Together, Etc.*

In Circuit Court of U. S., N. D. Georgia.

JOSEPHINE KING
vs.
SOUTHERN RAILWAY COMPANY.

Suit for Damages for Homicide.

In Circuit Court of U. S., N. D. Georgia.

INEZ KING, by Next Friend,
vs.
SOUTHERN RAILWAY COMPANY.

Suit for Damages for Personal Injuries.

It is, by consent, ordered that the two cases above stated be tried together, and that the evidence introduced shall be applicable to each case as if it had been alone for trial, and separate verdicts in each case shall be rendered.

This April 24, 1906.

WM. T. NEWMAN,
U. S. Judge.

Filing: Filed in clerk's office, April 24, 1906. O. C. Fuller, Clerk.

Amended answer of defendant, hereinafter printed at page 36.

* * * * * * *

Filing: Filed in office and docketed April 24, 1906. W. C. Carter, Deputy Clerk.

19 *Order Sustaining Demurrer.*

The demurrer to the within amendment is hereby sustained. This April 27, 1906.

WM. T. NEWMAN,
U. S. Judge.

Filing: Filed in Cleerk's office 27 day April, 1906. O. C. Fuller, Clerk.

Instructions.

In the Circuit Court of the United States for the Northern District of Georgia, Eastern Division.

No. 21.

Mrs. JOSEPHINE KING, Plaintiff,
vs.
SOUTHERN RAILWAY COMPANY.

No. 26.

Miss INEZ KING, Plaintiff,
vs.
SOUTHERN RAILWAY COMPANY.

Instructions.

Charge of the Court, hereinafter printed at page 137.

* * * * * * *

Verdict.

We, the jury, find for the plaintiff the sum of thirty-two hundred fifty dollars, $3250.00, including interest.
This 27th day of April, 1906.

T. G. HADAWAY, *Foreman.*

20 *Judgment.*

Whereupon it is considered, ordered and adjudged by the Court that the plaintiff, Josephine King, do recover of the defendant, the Southern Railway Company, the sum of three thousand two hundred and fifty dollars, with cost of suit.
This April 27th, 1906.

REUBEN R. ARNOLD,
HOWARD THOMPSON,
Plaintiff's Att'ys.

Judgment signed and filed in open Court April 27th, 1906.
H. H. SIMMONS,
Deputy Clerk.

Motion for New Trial.

In the United States Circuit Court for the Eastern Division, Northern District of Georgia, —— Term.

No. 21.

Mrs. Josephine King
vs.
Southern Railway Company.

Suit for Damages.

Verdict and Judgment for Plaintiff on April 27th, 1906, for $3250.00 and Costs.

And now comes the Southern Railway Company, defendant in the above case, within the time provided by the order granted on the day said verdict was rendered and before the final adjournment of said Court, and moves the Court to set aside said verdict and grant a new trial, upon the following grounds:
Motion for new trial and order thereon, hereinafter printed at page 143.

* * * * * * *

Filing: Filed in office and docketed June 2nd, 1906, O. C. Fuller, Clerk.

21 *Amended Motion.*

Mrs. JOSEPHINE KING
vs.
SOUTHERN RY. COMPANY.

INEZ KING, by Next Friend,
vs.
SOUTHERN RY. COMPANY.

Amended motion for new trial, hereinafter printed at page 166.

* * * * * * *

Filing: Filed in office and docketed Oct. 27th 1906. O. C. Fuller, Clerk.

Order Overruling Motion.

This motion for new trial is hereby overruled and a new trial denied.
Oct. 27, 1906.

WM. T. NEWMAN,
U. S. Judge.

Filing: Filed in Clerk's office 27th day Oct., 1906. O. C. Fuller, Clerk. By J. C. Moore, Deputy.

22 *Affidavit of T. G. Hadaway.*

In the U. S. Federal Court for the Eastern Division of the Northern District of Georgia.

Mrs. JOSEPHINE KING
vs.
SOUTHERN RY. COMPANY.

INEZ KING, by Next Friend,
vs.
SOUTHERN RY. COMPANY.

Two Suits for Damage.

Tried Together; Verdicts for Plaintiffs, and Motion for New Trial.

GEORGIA,
Clarke County:

Personally came before the undersigned, an office- of said State and County, authorized to administer an oath, F. G. Hadaway, who, being duly sworn, says:

I was a member of the jury that tried the two above stated cases, that of Mrs. Josephine King versus the Southern Railway Company

and that of Miss Inez King, vs. So. Ry. Co., at the April Term, 1906, of the U. S. Circuit Court for the Eastern Division of the Northern District of Georgia. At the time the Judge was delivering his charge there was a terriffic hail storm in progress and the noise made by the storm was so great that I could not hear all the Judge said with any sort of distinctness, and not sufficient to be able to understand his instructions.

This affidavit is made to be used in the motion for new trial in each of the above stated cases.

T. G. HADAWAY.

Sworn to and subscribed before me, this October 26th, 1906.
JAMES F. FOSTER, *J. P.*

Filing: Filed in clerk's office, Oct. 27, 1906. O. C. Fuller Clerk.

23 *Affidavit of Thos. F. Green.*

In the United States Federal Court for the Eastern Division of the Northern District of Georgia.

MRS. JOSEPHINE KING
vs.
SOUTHERN RY. COMPANY.

INEZ KING, by Next Friend,
vs.
SOUTHERN RY. COMPANY.

Two Suits for Damages.

Tried Together, Verdict for Plaintiffs, and Motion for New Trial.

GEORGIA,
Clarke County:

Personally came before the undersigned, an officer of said State, authorized to administer an oath, Jno. J. Strickland and Thos F. Green, each of whom being duly sworn, said: I was of counsel in the trial of the two above cases at the April Term, 1906, of the U. S. Circuit Court at Athens, Ga. At the time the Judge was delivering the charge, I was as close to him as were a number of the jurors, and made every effort to hear and understand what the Judge said. The raging of the storm outside made so much noise that I found it impossible to hear a great deal he said, and found it impossible to follow his instructions with any sort of certainty; that a juror unfamiliar with the law and the instructions expected, in my opinion, at that time, could not have heard a sufficient amount of what the Judge said to get any connected opinion as to what law the Judge was actually charging.

This affidavit is made to be used in the motion for new trial in each of the above stated cases.

JNO. F. STRICKLAND.
THOS. F. GREEN.

Sworn to and subscribed before me, this October 26, 1906.

T. L. MITCHELL,
[SEAL.] *Notary Public, Clarke Co., Ga.*

Filing: Filed in Clerk's office, October 27, 1906. O. C. Fuller, Clerk.

24 *Petition for Writ of Error.*

In the Circuit Court of the United States for the Eastern Division of the Northern District of Georgia.

JOSEPHINE KING
vs.
SOUTHERN RAILWAY COMPANY.

The above named defendant, conceiving itself aggrieved by the verdict rendered against it at the April Term, 1906, of said Court, to-wit: on the 27 day of April, 1906, and at the judgment entered up against it upon said verdict; and also by the rulings, decisions and acts in said case of said Court and the Judge presiding therein, which are specifically set forth in its bill of exceptions and its assignments of error herewith filed, alleges that said verdict was unjust and erroneous, and that the judgment entered against it was unjust and erroneous, and that the Court and Judge thereof erred in rendering said judgment and in making the decisions and rulings and in the acts, as in said bill of exceptions and as-ignment of errors are set out, greatly to the prejudice and injury of defendant, all of which will more fully appear in said assignment of errors and bill of exceptions.

Wherefore defendant comes and prays that a writ of error may issue in its behalf to the United States Circuit Court of Appeals for the Fifth Circuit, for the correction of the errors so complained of, and that a transcript of the records, proceedings and papers in said case, duly authenticated, may be sent to said Circuit Court of Appeals. And also that an order be made fixing the amount of security which defendant shall give upon the said writ of error to the plaintiff, and providing that upon the giving of such security all further proceedings in this Court be suspended and stayed, and that judgment against defendant in favor of plaintiff be suspended and stayed, until the determination of said writ of error by the United States Circuit Court of Appeals for the Fifth Circuit.

This Nov. 17, 1906.

JNO. J. STRICKLAND,
Defendant's Attorney.

[Indorsed:] U. S. Circuit Court. Filed in Clerk's office, Nov. 17, 1906. O. C. Fuller, Clerk.

25 *Order Allowing Writ of Error and Supersedeas.*

In the Circuit Court of the United States for the Eastern Division of the Northern District of Georgia.

JOSEPHINE KING
versus
SOUTHERN RY. COMPANY.

On the — day of November, 1906, comes the defendant in the above stated case, by its attorney, and has filed therein and presented to the Court its petition, praying for the allowance of a writ of error, intended to be urged by it, and defendant also presents herewith as [an] assignment of errors alleged to have been committed, and prays that a transcript of the verdict, judgment, record, proceedings and papers upon which the several orders herein rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit, and that such other and further proceedings be had and as may be proper in the premises.

On consideration thereof, the Court does allow and grant the writ of error, upon the defendant giving bond and security in the sum of $6500.00, and upon the giving of said bond in said sum, when it is approved by the Court, the judgment herein rendered in favor of plaintiff against the defendant shall be suspended, and supersedeas will be granted until the determination of said writ of error by the United States Circuit Court of Appeals for the Fifth Circuit.

WM. T. NEWMAN,
U. S. Judge.

Filing: U. S. Circuit Court. Filed in Clerk's Office, Nov. 17, 1906. O. C. Fuller, Clerk.

* * * * * * *

26 *Assignment of Error.*

In the United States Circuit Court for the Eastern Division of the Northern District of Georgia.

No. 21.

JOSEPHINE KING
vs.
SOUTHERN RY. COMPANY.

The defendant in this action in connection with its petition for a writ of error, makes the following assignment of error, which it avers occurred upon the trial of the cause, to-wit:

1. The Court erred in striking the amendment filed by defendant, which was filed on April 24, 1906, and is in these words, to-wit:

"Now comes the Southern Railway Company, the defendant in

the above stated case, and by permission of the Court first obtained, amends its answer already filed, and says plaintiff should not recover in this case, for the following additional reasons:

Paragraph XI.

At the time plaintiff alleges she was injured and for many years prior thereto, and now, defendant controls and operates a line of railroad from the City of Washington, D. C., through the State [States] of Virginia, North Carolina, South Carolina and into and through Georgia; said line forming a continuous line of railroad, the same having been formed under the Act of Congress for the purpose of facilitating commerce among the several states, and the postal and military communications of the United States, and to that end for the purpose of carrying passengers, freight, government mails, troops and supplies from one state into another.

Paragraph XII.

Defendant further shows that the train which plaintiff alleges injured her was a through train made up in the City of Washington, D. C., carrying U. S. Mail and an express car of merchandise and passengers' coaches with passengers going from one state into another; and this defendant, by said train was doing an interstate business under the authority and control of the Congress of the United States.

27 Paragraph XIII.

Defendant further shows that the statute of Georgia which is in these words, to-wit:

"There must be fixed on the line of said road, at the distance of 400 yards from the centre of each of said road crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof so as to stop in time should any person or thing be crossing said track on said road," the violation of which plaintiff alleges as the negligence in this case is and was inoperative as to defendant's train, which plaintiff alleges injured her, for the reason that it is in violation of Section 8, Article First, of the Constitution of the U. S., which gives to Congress the right to "regulate commerce with foreign nations and among the several states, and with Indian tribes."

Paragraph XIV.

Your defendant further shows that the Statute of Georgia is not a reasonable regulation under the police power of the state to secure the safety of passengers, but that the statute is a direct burden on and impedes the interstate traffic being done by this defendant, and impairs the usefulness of its facilities for such traffic.

Paragraph XV.

Defendant further shows that it is impossible to observe said statute and carry the mails as defendant is required to carry them under the contract it has with the government; and it is likewise impossible to do an interstate business, and at the same time comply with the terms of said statute.

Wherefore, it says that said statute is inoperative as to it, and it should not be required to comply with the same on its interstate line of railroad.

All which it stands ready to verify and prays that it be hence discharged with its reasonable cost.

JNO. J. STRICKLAND AND
THOS. F. GREEN,
Defendant's Attorneys.

28 GEORGIA,
Clarke County:

You, Jno. J. Strickland, do swear that you have had charge of the above case since the same was served on defendant, and have filed all of the pleadings for the defendant. At the time of filing the original answer the defendant did not omit the new facts of defence set out in the amended answer for the purpose of delay, and the amended answer is not now offered for the purpose of delay. So help you God.

JNO. J. STRICKLAND.

Sworn to and subscribed before me, this April 24th, 1906.
H. H. SIMMONS,
Deputy Clerk.

2. The Court erred in rejecting the evidence of Ben Dewberry, a witness for the defendant, which occurred as follows:

BEN DEWBERRY, stated that:

"There are between ninety and one hundred crossings on the Southern Railway between the South Carolina line and Atlanta."

Plaintiff's Counsel said:

"I object to that question and to the answer, because incompetent, immaterial and inadmissible. I think the entire case should be confined to this crossing."

Counsel for defendant then stated:

"I expect to prove that between the South Carolina line and Atlanta, there are practically one hundred road crossings, or between eighty-five and one hundred public road crossings; that the distance is one hundred and one miles; that the crossings in some localities are very close together, and within a few hundred yards of each other, and at others farther apart, but on the average making a crossing to the mile almost. We expect to show further, that to observe the statute and check and keep checking so as to have a train under control, and to stop should any person or thing be on the crossing it would consume from five to ten minutes from each crossing

dependent, of course, upon the weight and length of the train, and the grade; but it would make an average of seven *of* eight minutes. We wish to show that this train was made up and known as No. 39, the vestibule train -hich runs from the City of Washington,
29 through the States of Virginia, North Carolina, South Carolina and Georgia; that it was carrying passengers from one state to another, also carrying an express car with freight on it, from one state to another. We wish and expect to show that obedience to that Crossing Act would hinder, and practically prevent interstate business being done by the defendant railroad. We wish to show the condition I have just stated all existed at the time this accident occurred, on the 11th of October, 1903.

By the COURT: The testimony will be excluded, and you may have an exception noted to this ruling.

The Court erred in refusing to direct a verdict for the defendant at the close of all of the evidence upon defendant's motion which was in these words, to-wit:

Now comes the Southern Railway Company, the defendant in each of the above cases, at the close of the evidence in each, and moves the Court to direct a verdict for the defendant in each, upon the following grounds:

1. Because the evidence fails to show that this defendant was guilty of any negligence which was the proximate cause of the injury to the husband of the plaintiff, Josephine King, or to the plaintiff, Inez King.

2. The evidence fails to show that the place where plaintiffs were injured was a public crossing established under as required by law, and a place where this defendant under the Statute of Georgia, was required to check its trains.

3. The evidence shows that the plaintiff, and A. O. King, who was the husband of Josephine King, and the father of Inez King, drove on to the crossing without using their sense of sight or hearing to ascertain whether or not the train was approaching at a time and place where, if they had used either their sense of sight or hearing they could have discovered the train was approaching and was not checking for that crossing; that after they discovered, or had they been in the exercise of the care of ordinarily prudent persons would have discovered that the defendant's train would not check for the crossing in question. By the exercise of their senses, they could have then avoided the consequences of defendant's negligence, if any existed.

30 When the entire evidence is tested by the rule laid down in Lucas, v. Brooks, 22 Wallace, 116, to-wit:

"The true rule in the case is that, if to the judicial mind, the evidence tested by the law of the issue, and the rules of the evidence is not sufficient to justify a jury fairly and reasonably in finding a verdict for plaintiff, the Court should so tell the Jury."

Wherefore it prays, that a verdict be directed in its behalf.

JNO. J. STRICKLAND AND
THOS. F. GREEN,
Att'ys for Defendant.

Denied and exceptions allowed and noted, Feb. 27th, 1906.

WM. T. NEWMAN,
U. S. Judge.

3. The Court erred in making the charge to the jury, in refusing to state propositions requested by the defendant in the following instances, to-wit:

"1. If you believe from the evidence in this case that at the time the husband of the plaintiff, Josephine King and the plaintiff, Inez King were injured, the railroad was guilty of negligence in that its engineer failed to check and keep checking the train from the blow post to the crossing upon which they were hurt, or in failing to blow the signal as the statute requires, or running at a reckless rate of speed, yet after the negligence of the railroad company began, if it was apparent to A. O. King, that the engineer was not checking the train, or it would have been apparent had he been in the exercise of the care of an ordinarily prudent person, and that said railroad was not in the discharge of its duties as to giving signals of the approach of a crossing, but that it was coming to the crossing at a high rate of speed, if it was in the power of the said A. O. King to have avoided the danger from the negligence of the defendant by the exercise of ordinary care, then neither plaintiff in this case can recover."

"2. I charge you that it appearing from the evidence that A. O. King, the husband, and his wife, Josephine King, and his minor daughter, Inez King were riding in the buggy of the said
31 A. O. King, and being driven by him, that the negligence on the part of the said A. O. King was attributable to his daughter, Inez King, and if, under the rules I give you in charge, such negligence would have prevented the said A. O. King, from recovering had he sued, the same would prevent either Josephine King or Inez King from recovering."

—. "I further charge you, that, if you believe under the evidence in the case, that the plaintiff, Josephine King, and her daughter, Inez King, and her husband, A. O. King were driving in a buggy approaching the crossing where they were injured, and if, you further believe that — they stopped and looked or listened, they would have discovered the approach of the train in time to have avoided the negligence of the defendant company in failing to check or in any other negligence being committed by it, and you further believe that they went on such crossing without having stopped and listened or looked for the approach of the train, then I charge you that neither Josephine King nor Inez King can recover in this case."

4. "I further charge you that the care to be exercised by the said A. O. King in approaching the crossing and railroad track is that care which an ordinarily prudent person would exercise for his own safety. What would or would not amount to negligence in the manner in which a person entered upon a railroad track would depend to a large extent upon the peculiar location of the place at which he went upon the track. An ordinarily prudent person in the possession of all his faculties would (should) not attempt to cross a railroad

track at any place without at least using his sense of sight, of not that of hearing, to discover whether at the time and place he was about to cross the same, there were present any of those dangers which a person of ordinary intelligence would reasonably apprehend."

NOTE.—The Judge gave this request in charge, except he substituted the word "should" for the word "would" which as movant insists, changed the whole force of the charge.

5. "I further charge you that, if you believe from the evidence that A. O. King had stopped immediately before crossing the railroad, that is, a few feet from it, and had looked, that he could have discovered the approaching train for a considerable distance, and
32 he went on the track without so looking, when, if he had looked, he could have discovered the approach of the train, or, if he had stopped and listened, could have heard its approach and thus avoided the accident, then I charge you that neither plaintiff in this case can recover."

6. "If you believe from the evidence that the view from the direction in which the train was coming near the crossing was so concealed that A. O. King could not see whether or not the train was approaching, then I charge you an ordinarily prudent person under such circumstances would have stopped and used his sense of hearing, and, if you believe this condition existed, and A. O. King drove on the crossing without having stopped and listened, and, if he had listened, would have heard the approaching train in time to have avoided the injury, then I charge you neither plaintiff in this case can recover."

7. "If you believe from the evidence that A. O. King did discover the approaching train before driving onto the crossing, and yet drove on believing that he could cross before he was struck, then I charge you that neither plaintiff can recover."

8. "The rule of law given you in charge as to the duty of railroads to blow and check, etc., at crossings only apply to the crossings at public roads established according to law."

9. "Unless the evidence satisfies you that there is either an Act of the Legislature of Georgia, or a judgment of an inferior Court of ordinary, or the County Commissioners of Roads and Revenues, of Habersham County, establishing the road in question as a public road, or the evidence satisfies you that the road has been in continuous use as a public road for twenty years as it now is located, then under the law the road in question is not a public road such as the law contemplates, when it requires the railroad to blow for the crossing. This is true, regardless of whether or not there was a blow post or crossing signal, or how the railroad company itself had been treating it."

10. "If you believe from the evidence that Dewberry, the engineer saw the Kings going towards the crossing, but in a safe place, he had a right to presume they would not go on the track, and
33 there was no duty on the engineer to take any steps in regard to them until it was apprehended they were in danger or intended going on the track."

6. The Court erred in limiting the argument in the case to one

and one-half hours to the side. Practically four days have been consumed in putting in the evidence and two cases being tried together.

7. The Court erred in using the following language in the charge to the jury:

"Under the Statute of Georgia, gentlemen, which has been referred to, it is the duty of the engineer- of trains in Georgia, when approaching a crossing to blow the whistle as has been stated to you by counsel, and to check and keep checking their trains as they approach the crossing, so as to be able to stop them, if any person or thing should be upon the crossing. That is the Statute of this state, and it is entirely clear that they were not doing that in this case, so there is no question that the railroad through its servants, agents and employees was guilty of negligence.

I, therefore, charge you as a matter of law, that the defendant through its servants, agents and employees was guilty of negligence."

Wherefore for the errors herein assigned, the defendant, the Southern Railway Company, prays that the verdict and judgment of the Circuit Court against it be set aside.

JNO. J. STRICKLAND,
Att'y for So. Ry. Co., the Def't.

Filing: U. S. Circuit Court. Filed in clerk's office Nov. 17, 1906. O. C. Fuller, Clerk.

34 *Acknowledgement of Service.*

In the United States Circuit Court for the Eastern Division of the Northern District of Georgia.

JOSEPHINE KING
vs.
SOUTHERN RAILWAY COMPANY.

We acknowledged due and legal service of the petition for writ of error, the order allowing said writ of error, the assignment of errors filed therewith, the writ of error, and the citation issued thereon in the above stated case.

This 17th day of November, 1906.

REUBEN R. ARNOLD,
HOWARD THOMPSON,
Plaintiff's Attorneys.

Filing: U. S. Circuit Court. Filed in clerk's office Nov. 17, 1906. O. C. Fuller, Clerk.

Bond.

GEORGIA,
Clarke County:

Know all men by these presents, That, we, the Southern Railway Company, as principal, and J. W. English, as security, are held and

firmly bound unto Josephine King, her certified attorney, heirs, executors and administrators in the sum of sixty-five hundred ($6500.00) dollars, to which payment well and truly to be made, we bind ourselves, our heirs, successors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 17th day of November, (1906), in the year of our Lord, 1906.

Whereas, lately at a Circuit Court of the United States, for the Eastern Division, of the Northern District of Georgia, in a suit pending in said Court, between Josephine King, plaintiff, and the Southern Railway Company, defendant, a verdict by the jury, and a judgment was rendered against the said Southern Railway Company, for thirty-two hundred and fifty ($3250.00) dollars, and the said Southern Railway Company having obtained a writ of error and filed a copy thereof in the clerk's office of the City Court, to reverse
35 the judgment in the aforesaid suit, and a citation directed to the said Josephine King, citing and admonishing him [her] to be and appear before the United States Circuit Court to be held at New Orleans, La., within thirty days from the date thereof.

Now, the condition of the above obligation is such, that, if the said Southern Railway Company shall prosecute said writ of error to effect, and answer all damages and cost, and pay the eventual condemnation money, if it fail to make its plea good, then the above obligation to be void, else to remain of full force and effect.

[L. S.] SOUTHERN RAILWAY CO.,
Principal,
By JNO. J. STRICKLAND,
Att'y of Record.

[L. S.] J. W. ENGLISH, *Security.*

Signed, sealed and delivered in the presence of
J. M. MILAM.
STEWART McGINTY,
Notary Public, Fulton Co.

Order Approving Bond.

This bond is approved and it is ordered that the same operate as a supersedeas, and that judgment be stayed until the United States Circuit Court of Appeals for the Fifth Circuit pass upon the writ of error sued out by the said Southern Railway Company.

This November 17th, 1906.

WM. T. NEWMAN,
U. S. Judge.

Filing: U. S. Circuit Court. Filed in Clerk's office, Nov. 17th, 1906. O. C. Fuller, Clerk.

36 *Bill of Exceptions.*

In the Circuit Court of the United States for the Eastern Division of the Northern District of Georgia.

No. 21.

JOSEPHINE KING
vs.
SOUTHERN RY. CO.

Be it remembered, That on the trial of this cause in this Court, at the April term, 1906, of said Court, the Honorable Wm. T. Newman, Judge, presiding, *when* the following proceedings were had, to-wit:

The Southern Railway Company, the defendant, filed an amendment to its answer, which on oral demurrer was on April 27th, 1906, dismissed. Amendment and order being in words as follows:

In the Circuit Court of the United States for the Eastern Division of the Northern District of Georgia.

JOSEPHINE KING
vs.
SOUTHERN RAILWAY CO.

Suit for Damage.

Now comes the Southern Railway Company, the defendant in the above stated case, and by permission of the Court first obtained, amends its answer already filed, and says plaintiff should not recover in this case, for the following additional reasons:

Paragraph XI.

At the time plaintiff alleges she was injured and for many years prior thereto, and now, defendant controls and operates a line of railroad from the City of Washington, D. C., through the State [States] of Virginia, North Carolina, South Carolina and into and through Georgia; said line forming a continuous line of railroad, the same having been formed under the Act of Congress, for the purpose of facilitating commerce among the several states, and the postal and military communications of the United States, and to that end for the purpose of carrying passengers, freight, government mails, troops and supplies from one state into another.

37 Paragraph XII.

Defendant further shows that the train which plaintiff alleges injured her was a through train made up in the City of Washing-

ton, D. C., carrying U. S. Mail, and an express car of merchandise, and passenger coaches with passengers going from one state into another; and this defendant by said train was doing an interstate business, under the authority and control of the Congress of the United States.

Paragraph XIII.

Defendant further shows that the Statute of Georgia, which is in these words, to-wit:

"There must be fixed on the line of said road, at the distance of 400 yards from the centre of each of said crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof so as to stop in time should any person or thing be crossing said track on said road," the violation of which plaintiff alleges as the negligence in this case is an- was inoperative as to defendant's train, which plaintiff alleges injured her, for the reason that it is in violation of Section 8, Article First, of the Constitution of the U. S., which gives to Congress the right to "regulate commerce with foreign nations, and among the several states and with Indian tribes."

Paragraph XIV.

Your defendant further shows that the Statute of Georgia is not a reasonable regulation of the police power of the state to secure the safety of passengers, but that the statute is a direct burden on and impedes the interstate traffic being done by this defendant, and impairs the usefulness of its facilities for such traffic.

Paragraph XV.

Defendant further shows that it is impossible to observe said statute and carry the mails as defendant is required to carry them under the contract it has with the government; and it
38 is likewise impossible to do an interstate business, and at the same time comply with the terms of said statute.

Wherefore, it says that said statute is inoperative as to it, and it should not be required to comply with the same on its interstate line of railroad.

All which it stands ready to verify and prays that it be hence discharged with its reasonable cost.

JNO J. STRICKLAND AND
T. F. GREEN,
Defendant's Att'ys.

GEORGIA,
Clarke County:

You, Jno. J. Strickland do swear that you have had charge of the above case since the same was served on defendant, and have filed all of the pleadings for the defendant. At the time of

filing the original answer, the defendant did not omit the new facts of defense set out in the amended answer for the purpose of delay and the amended answer is not now offered for the purpose of delay. So help you God.

JNO. J. STRICKLAND.

Sworn to and subscribed before me, this April 24th, 1906.
H. H. SIMMONS,
Deputy Clerk.

The jury was empanelled and sworn according to law, to try the above case, the same being an action for personal injuries received at the hands of the railroad at a crossing. The trial of said case begun on April 27th, 1906, and the following evidence which relates to, bears upon and is material to the errors complained of, was introduced in the presence of the Court and jury.

39 *Record.*

In the Circuit Court of the United States for the Northern District of Georgia, Eastern Division.

No. 21.

Mrs. JOSEPHINE KING, Plaintiff,
vs.
SOUTHERN RAILWAY COMPANY.

No. 26.

Miss INEZ KING, Plaintiff,
vs.
SOUTHERN RAILWAY COMPANY.

Before Hon. W. T. Newman, Judge Presiding, and a Jury.

Appearances.

For the Plaintiff, Reuben R. Arnold, Esq., Howard Thompson, Esq.
For the Defendant, Messrs. Strickland & Green.
R. A. Henderson, Official Reporter.

Mrs. JOSEPHINE KING, a witness called and sworn in her own behalf, and in behalf of Miss Inez King, testified as follows:

Examined.

By Mr. ARNOLD:

I am plaintiff in one of these cases. I live in Banks County, Ga.. My husband's name was A. O. King. An accident happened to him on Sunday, October 11th, 1903, in which he

met his death. Myself and daughter were with him when he was killed. My husband, daughter and myself had been to church that day. The church was about two miles and a half from our house. The church was in Habersham County, Ga. We had to cross the tracks of the Southern Railway on our way home from church. We cross the track at what is called Mag Wade's Crossing. The road is called the Clarksville road I reckon.

Q. Is that a public road?

40 Mr. STRICKLAND: I object to that question. This witness cannot give her opinion as to that. The public records would be the best evidence.

By the COURT: I think she can answer. Objection overruled.

WITNESS: Yes, it is always called a public road. I have known it as a public road all my life, I reckon. I was fifty-four years of age last May, I believe. Yes, we made the trip safely to the church on that morning of the 14th of October. We started from home between nine and ten o'clock in the morning, I reckon. We got there before the services, and they always commence at eleven o'clock. We left the church after the services were over. I reckon we stayed about an hour and a half; I don't know. Yes, I reckon about half past twelve is the time we left the church. We were driving a mule and buggy; a one-horse buggy, and a one seated buggy. I was sitting on one side, my husband on the other and my little daughter in between us; that's the way we always carried her. On the way home we crossed at the same crossing, Mag Wade's crossing. There is a hill away along up there before we get to the crossing, all filled with bushes, and we could not see the train over the bank and bushes. As we approached that crossing we listened for the train. No, we could not see up the way the train was coming on account of the bank and the bushes. Yes, we looked in both directions. No, we did not see the train as we approached the crossing. I could not see up the road for them bushes on the bank, and we went right on and drove up to the track, and I looked for the train, and just as I looked, the train blew, and that is the last I knew. I recollect my husband trying to rush the mule across. The train looked to me as if it was right at us. No, I had not seen nor heard it until then. I could not tell you how high that cut is there, but there is a cut there. I really don't know how high it is, but I reckon it is some twelve feet, or something like that. No, I had not heard the train at all before it gave the blast just as it hit us. It blew two short blasts. We had no chance after that to get out of the way. The last I remember my husband doing, he tried to rush the mule across with the lines. I do not know what part of the buggy the train hit; I cannot tell you.

41 The buggy was torn up; that's what everybody told me, I was thrown on the ground, my daughter was thrown on the ground, too; my husband was thrown on the ground just by a post there. Yes, we were all thrown to the ground. No, my husband was not killed when I went to him. I don't know how long he lived, but they told me he lived an hour or two. Oh, yes, he died. I don't know how long I was unconscious. They took me to my home. No, I was not able to see my husband buried. My

daughter Inez was left in a mighty bad condition. My husband's age was sixty-two years. My husband before that time put in all the time he was able to work and labor. He was not very stout, but he put in all the time he could to make a support for his family. His business was farming. He plowed and hoed and cut wood, and such as that. Yes, and he hauled wood. He had two tracts of farm land, and he looked after those farms. I don't know that I can say what his labor was worth by the year, but he kept a support for us. There was just three of us at home there. I reckon his services were worth five hundred dollars a year. In one farm there was a hundred acres, and in the other mighty nigh two hundred acres. He had pretty near three hundred acres of land. Yes, he looked after both places. In front of our buggy, there was a hack and a one-horse wagon. Taylor Dodd and his wife was in the hack and Willie Dodd and Frank Irby was in the wagon. After the accident, my little girl stayed up and kept trying to go. She was not staying up all the time; she would lie in bed part of the time, and making an effort to get around. She was doing her best to get around for a week or two. She got worse all the time, until she could hardly walk, and could not breathe hardly. Her back and sides seem to be her greatest trouble. No, sir; I never did undress her and look at her person, when I got her home. Yes, I was in [a] bad condition. Yes, Inez certainly did finally get down. For a week or two after the accident, she kept trying to go as long as she could. When she got down, she was not able to do anything. Of course, she took to her bed. I don't know how many days she stayed in bed. No, she has not been able to walk or work, or do any bodily labor since She is in the roller chair, because she is not able to walk but a few steps at a time, and that worries her. Yes, she can stand a little while. No, sir; she cannot do any work, or to labor now like she used to. Before, she used to do all the washing, helped me cook, done all the ironing, milked the cows, helped her pa hoe, or do anything he wanted her to do. During the two or three weeks
42 she was up and about ailing, she might have tried to wash the dishes, and I think she did try to make up the beds. After she had got down, she had not been able to do anything of that kind. She has not been of any service to herself or to my family. I have to take care of her and wait on her all the time. She cannot dress herself; her clothes have to be handed to her. Her age at that time was fifteen years.

Cross-examination.

By Mr. STRICKLAND:

I could not tell you the time of day the railroad train struck our buggy, but I reckon it was some time about one or two o'clock. As we went down towards the railroad, I did not hear any train. I was looking for the train, and listening for the train. I could not look *look* up that way for the bank and bushes, but there was nothing in the world to hinder me from looking at the track all the time. I could not help looking down the track, because there was nothing in my way. I could not see up that way

on account of the bank and bushes, until I got right by the railroad there. Before reaching the railroad track, it is not very far to the place where I could see up the track. When I got right on the track, I could look up it. No, sir; I don't think I could have look-up the track ten or fifteen steps from the track, for all them bushes. I don't know that there was a space of twenty steps along the road before we got to the railroad crossing, at any point of which I could have seen the train approaching from the north, had I looked. I was listening all the time. As to distance, I could not tell you whether there is a space of sixty odd feet before reaching the track, that I could have seen the train. You could not see the train until you got right on the track there. The bank and bushes would prevent me seeing it. Yes, there is an excavation there, where there is a sand pit, or something cut out there. That pit is just above the crossing. There is a bank there, and the bushes are all over it. The bushes are all along there, plumb across. You had to be on the track before you could see the train. I did not have anything to do about my husband hurrying up the mule. What I said was, the last I remember was, he tried to rush the mule with the lines. He never said anything to me, or me to him. I did not motion to him, or hurry him up. I just looked and saw the train,
and just as I looked up it blowed two short blasts. I just
43 turned my head to my husband; I recollect that, and just
as I done that he tried to rush the mule across. He tried to rush the mule with the lines, I think that's the way. Before that I had not looked up the track and saw the train approaching. We just got right there and I looked up the track and just as I looked, it blew two short blasts. It then looked to me as if the train was right at us. I was listening for the train all the time, for I never do cross unless I listen. We never stopped before going on the crossing. I was listening all the time, and that is the reason we did not stop. We were just walking on across the track. Yes, my husband had two farms. He rented them out, and some he tended hisself [himself]. Yes, he made a crop himself, and rented out the rest. He had no one to help him make the crop, except the little girl; he did the plowing himself. No, he did not have as good health as he used to have, but he had very good health, I reckon, for his age. Of course, he never was as stout as he was before the war. I think it was sixteen years before he was killed, that he applied for a pension. No, sir; he did not apply for a pension a year or two before he was killed. I don't know that Mr. Brown made application for a pension for him. I do not know how much my husband made a year, but he made a support, what we all lived on; what me and my daughter and he lived on. Yes, the farms paid a certain rent. He had two hundred acres in one farm and one hundred acres in the other. What he got from the farms, and what he made himself was the support. It took what he made to support us; perhaps some little things over and above. Yes, I was also hurt in the accident. They carried my daughter and me home in a wagon, I think. Yes, after we got home, I reckon Miss Inez did set up, she set up a week or so, I think. Yes, she tried to help me in the house work all she could. I don't think she went to the

spring. She tried to do everything she could, but she did not feel able to do anything. She may have milked along at the start. She might have helped cook some at the start, but not very much I don't reckon. For a week or so she kept up. I don't recollect how long. She could not do very much. She tried to walk around and do little things; tried to make up the bed; tried to wash dishes and then laid down. That's the way she did. I don't know what she did about playing with a baby that some one had there when she was up. Yes, when she was first hurt I had a physician examine her. I had Dr. Quillian, and a doctor from Gainesville (I forget his name), Goss, I think. Yes Oslin is the name I think.
44 I don't know whether there was another doctor or not. Afterward Dr. Hathcock gave her medicine. Dr. Hathcock came to see her when she first took to her bed. Yes, I sent for him. I reckon directly [after] the accident occurred, I employed counsel to bring suit. I cannot tell you how many days after the accident. I don't know whether it was a week or not; it was not very long I don't think. Yes, Dr. Hathcock came and examined her. He treated her five or six months, or seven months. I don't recollect how long. He came off and on for a long time. Yes, I remember the time Dr. Hathcock, Dr. Goss and Dr. Ham were there to see her. I think that was along in January, sometime, after she was hurt in October. I wanted Dr. Ham, but never sent for Dr. Goss. I wanted another doctor besides Dr. Hathcock. I don't know whether I sent for Dr. Ham. Mrs. Thompson told me it was best to have another doctor. I selected Dr. Ham; I wanted another. I had been talking about Dr. Ham before Mrs. Thompson named him. Dr. Hathcock never named it to me to have another physician to come in. At the time Doctors Ham, Hathcock and Goss were there. Dr. Quillian had not been there for a good little bit; only Dr. Hathcock. Dr. Quillian came in just after she was hurt. After Dr. Quillian left, Dr. Hathcock came in. I don't recollect exactly how long after she was hurt before Hathcock came. He treated her a good long time. He is the only one who treated he- at all until the board of doctors came. Then Dr. Hathcock still kept on treating of her. Dr. Ham has been the only one who have been treating her since. I cannot tell you how long. Dr. Ham has not seen her for good while; I guess it has been three months. He has not been there since last spring. It was not though, because I didn't need him. I suppose it has been over a year. The last time he was there before last spring, was when he put the plaster jacket on Inez with Dr. Quillian. That's the way I think it was. It has been so long I may forget things. Ham and Dr. Quillian put a plaster jacket on her, and I don't think he has been there since that, until he came last spring. Yes, I testified in Habersham Court, in the other trial that Inez had not been able to walk at all since she was hurt, but I never thought much about anything; her hurt or mine either. No, I did not state in that trial that she had not been able to walk since she was hurt. I said she tried to do it, but laid in the bed most of the time; complaining all the time, but trying to make up the beds and wash—I don't think I stated on the

45 former trial that "the only walking Miss Inez did since she was hurt was to turn her feet off the bed on to the floor, and get to the roller chair." I think I said she took a few steps at a time. Yes, since Miss Inez has been hurt, she has lived at my house all the time. She stays in the house all the time. She is in bed or in her chair all the time. No, sir; she does not get out in the sunshine; I take her out myself, roll her around and take her out on pretty days. She trys to do that herself, yes. Yes, I was there when Doctors Ham and Quillian put the plaster jacket on her. Yes, they swung her up to the joist in some way, to put it on, and the nail broke loose. She did not fall, we caught her. I held her by the arm. She can stand on her feet. I never said she could not; I was holding her, though. Me and my daughter are rooming together at the hotel or boarding house. It is not true that she walked about the room last night; just stepped from her chair that way. No, she did not walk from one end of the room to the other; no, sir.

Redirect examination:

No, sir; my husband was not a preacher; he exhorted, though. I don't know whether my little girl was in the bed first two or three days, or not. She was trying to walk around, doing all she could.

Miss INEZ KING, called and sworn in her own behalf and in behalf of her co-plaintiff, testified as follows:

Examined.

By Mr. ARNOLD:

My name is Inez King, and I am seventeen years old. The lady who just left the stand is my mother. Yes, I was present when my father was killed, and mother and I thrown out of the buggy. We got to the church that morning about nine or ten o'clock. No, we got to the church about eleven o'clock and stayed, I reckon, some time near twelve or one o'clock. Then we went back home. I was sitting between my father and my mother in the buggy. There is a bank right there at the crossing. I don't know for certain just how high the bank is, but it is twelve or thirteen feet high, I reckon. Yes, the railroad goes between two banks; what is called a cut. Yes, there were trees on the bank or hill then. As we come around by the crossing, we did not have a view to the north,
46 the way the train was coming for the bank and trees. Yes, it shut off the view of the train until we got right down to the track. There was nothing to hinder us from seeing a train coming from the South. I did not see any train approaching either way, until just as we drove upon the track. Yes, we listened and took heed of our surroundings. I did not see or hear any train coming. I did not see the train until just as we were on the track. I don't know just how close the train was to us then, but I reckon something like twenty yards perhaps. Just as I seen it, it blowed just two little short blasts. After it blowed two little short blasts, we did not have any chance to get out of the way. My father slapped the mule with the lines to hurry up the mule. The mule stepped on across. I don't

know for certain what part of the buggy was caught. The mule got out of the way, and the front wheels of the buggy the train caught. When the train hit the buggy we were thrown out. I was thrown on the ground. I cannot tell how high up I was thrown; I don't know; I fell right on my back. It was a hard fall. Mother was thrown on the ground. Father was thrown on the ground. I don't know what part of my father struck the ground. The first thing I knew was, I hit the ground, from the time I saw the train. I came to as I hit the ground. My father was dying when I came to. He was lying on the ground. I don't know whether he was conscious or unconscious. He laid there I think, until he died. Yes, he died on the ground. I don't know how long he lived; but they say he lived an hour, I think. I was sitting there when he died. After I got home I found out where I was hurt. My hip was hurt, and I was hurt in the chest. I was hurt in the hip (indicating), right here, and it went around to my back and spine. The next day I was hardly able to do anything, but I tried to. I dragged around, trying to do something as long as I could. I cannot say for certain, but I think it was something near two weeks before I was taken down to my bed. I took to my bed because I was not able to stay up. The weakness and pain that kept me from going around, struck me in the back and side. Since I took to my bed I have not been able to do any physical work at all. I was in bed six or seven days before I tried to sit up. I now get around in this chair. The effect of trying to walk, it just worries me, and makes me so nervous I cannot hold my body still. Yes, I have spells of nervousness. I have them every day. When I have these nervous spells, it makes me so weak all over and everything, I cannot hardly live; and it causes my back to hurt awful bad, and my head
47 too. I am suffering pain in my back right now. I can stand but a little while at a time. Before this accident, I was always able to go and do what work I wanted to. I was fifteen years old when this happened. Before the accident I could wash, iron, cook, starch, sew, milk cows, hoe cotton, pick cotton. I cannot do any of that now. Yes, since I have been confined to my bed and my chair, I have made efforts to walk and to stand, but am not able to do it more than a few steps at a time. I am obliged to use this chair to get about with any comfort. I move it by rolling the wheel this way, and sometimes I am not able to do that; it makes me nervous. Yes, I go from one room to another at home, in this chair, all the time. I get better at times. Sometimes I feel a little better, and sometimes I feel so bad I cannot sit up, and then I take to my bed. I said I had those nervous spells almost every day or night. I cannot sleep for my nervousness. (Here the witness exhibits to the jury the manner in which she moves around in her roller chair.)

Cross-examination:

At the time we were going along in our buggy, there was a wagon and a buggy in front of us. I don't remember at what gait they or we were traveling. I don't remember whether the mule was trotting or not, for certain. Before getting to the railroad, there was an embankment which we went down, and that embankment prevented us

seeing the train coming from the north. I don't know for certain how far it is from the bottom of that little embankment to the railroad track. It is something like ten steps I reckon. Anywhere, in that ten steps you could see but a little piece up the track. I don't know how far I could see. Yes, I could see a little piece. In that ten steps there is nothing to prevent me from seeing up the track. If I had been looking for a train when I was anywhere in that space of ten steps, I could have seen the train coming just a little piece. I don't mean by a "little piece" two hundred yards. I reckon it would be two hundred feet. That curve I suppose cuts off the view beyond. Beyond the curve, I suppose that cut prevents a view of the track. I don't remember the depth of the cut, I have not been there in so long. No, sir; we did not stop on the crossing. Yes, I looked up the railroad at one point. I don't remember where the buggy was at when I looked up the track. It was before we had gotten on the crossing though. Yes, I then looked up as well as I remember. I don't know whether my father looked up the track, or not.
48 I don't know what my mother did. When I looked up I did not see anything of the train, nor hear anything of it. No, we did not stop and listen but there was nothing to keep us from hearing the train if we didn't stop. No the horse and buggy was not making much fuss. I don't know what we were talking about. No, we had not been to a wedding that day. Yes, we were with a man and his wife who had just married. I don't know whether we were talking about that, or not. No, sir; I don't think I could have seen the train coming, if we had stopped anywhere within ten steps I spoke *if*, and looked up the track. You could not see any piece; it would have been right on us before we could see it. I don't know whether we could have heard the sound of the train running if we had stopped. Yes a running train makes a noise. If it made any noise, I never heard it. There was nothing to keep us from hearing. Yes, the train was right at us. My father's, my mother's and my own hearing was good. I could see all right at that time, and my mother and father could see well too. Just as I hit the ground is the first thing I remember. Just as I seen the train, just as we drove on the track, I don't remember anything more. I looked as it blowed. I don't know what struck me. It struck the buggy. I was thrown out and struck the ground. There was nobody helped me up. I got up myself. I was carried home in a wagon. After I got home that night, I helped get supper. I done something. I think I fixed the table for it, and cut some meat and fried it. I stayed up two or three weeks, and during that time I did what I could about the house. The evening we were hurt Dr. Hathcock examined me and Dr. Oslin that evening and next morning Dr. Quillian and Dr. Oslin was there, and Dr. Hathcock was not there; I took medicine from Dr. Hathcock from that night for three or four weeks. I don't remember the next time Dr. Hathcock was sent for. He was coming there all the time treating mother, and I was taking medicine from him. Yes, Mrs. Masters came over to see me in a week or two after I was hurt, and then Dr. Hathcock came to see me. He then came for about six or seven months. No, until then I had not been going where I pleased, but I got about as much as I could. Yes, then Dr. Ham came to see

me. Dr. Goss, Dr. Ham and Dr. Hathcock were all there together at one time, and made an examination of me; I think that was about two years ago. I don't remember when Dr. Ham came to see me next, after they left. No, it was not the next time he came to see me, that he put me in a plaster — paris jacket. I don't remember
49 just the day of the month he did that but it was in August, I think. Yes, he and Dr. Quillian did that. I don't remember how long after I was hurt that I got this chair. Colonel Thompson furnished it to me; he sent it over to me from Gainesville. Yes, that was after he was employed. I don't remember how long after. I got the chair after the time I saw Dr. Hathcock, and after I took to my bed. It is my back and side hurts me when I walk. Yes, I have the use of my limbs and my feet, but my back and side hurts me. No, sir; I don't walk about the room; can only take a few steps at a time. In dressing and undressing, I do that in my chair. Yes, I stay in the house most of the time, only when my brother or some one else carries me out. Yes, I have been there most of the time since I was hurt.

Redirect examination:

Yes, my brother or some one else takes me out in the sunshine sometimes, or my mother does. Until I got this roller chair. I had to sit in a plain chair. Yes, I listened and failed to hear that train. The train goes through a cut there, and I was coming around the brow of the hill on the dirt road. I suppose our buggy was a spring buggy. That dirt road is a good, easy road, so far as I know. There was not anything there to make a rattling sound to drown the noise of the train. If my mother and brother are not at home, I would have to sit where I was, if it was not for this chair.

M. M. FRANKLIN, a witness called and sworn in behalf of the plaintiff, testified as follows:

I live in Habersham County, about eight miles north of Clarksville. On the 14th of October, 1903, I was a passenger on a train of the Southern Railway, which killed Mr. King. I boarded the train at Cornelia, Ga. Yes, I have noticed Mag Wade's crossing. It is known as a public road crossing. It is a road which is traveled right smart. I have noticed whether the railroad put up a sign there, "public crossing." I have seen a blow post near there; I don't know how far it is from the crossing, but I suppose something like four hundred yards away. There is one north, and one south of the crossing. The first thing I knew of the accident, I had struck up with a gentleman I had not seen for eight or ten years, and he told me there was a woman and baby killed. He saw the accident. He
50 was sitting on the left hand side, and I was on the right. After the train stopped and backed back, I was the first one off the train. There were others on the dirt road; but I was the first one to him; helped pick him up and toted him across the road and placed him in the shade. He was breathing then. I don't know how long he lived, but I heard afterwards he lived forty minutes. His wounds were between the shoulders, badly hurt, and his right

thigh, as well as I remember, seemed to be hurt. The buggy was demolished; the hind part, divided it between the two wheels, simply tore that to trapsticks. The mule went on some distance from where the accident occurred and turned off into a cotton field. As to the coach I was in, I cannot say positively, but I think I was in the third coach from the engine. The train approached that crossing very fast. It did not stop up one bit, that I could tell. I hate to say how fast the train was running, but somewhere between 45 and 60 miles an hour. This would be simply guess work on my part. I have ridden on trains, and have seen them run, and that would be my best judgment. I heard the train blow, but whether it was for this crossing where the accident happened or the crossing before that, I don't know; but I am certain it blowed for one or the other of those crossings. The other crossing is north of this one, as well as I can guess, about half a mile. I cannot say I heard it blow for this particular crossing, positively. No, I did not hear two short blasts. I was engaged in conversation, and I did not think of any accident, and was not looking out for that. They did not check up for that crossing, so far as I could tell. I think the engine must have gone 250 or 300 yards beyond the crossing, but that is simply guess work again. I never measured it. It seemed to me the train was running faster than any train I was ever on. The first thing that called my attention to the train running so fast, the gentleman sitting before me raised up and said, "why in the world is the train running so fast," and that caused me to notice it. I had not particularly noticed how fast the train was running until he called my attention to it.

Cross-examination:

No, I had no way of measuring the speed of the train, and I am not prepared to state that it was not running on its schedule. They called it to be on time at Cornelia, but other people reported it to be five minutes late at Cornelia; the sign board at Cornelia said "On
51 Time." The place where this accident happened is two or three miles from Alto, but I don't know how far it is from Cornelia. I think we passed Alto when the accident happened. Yes, at the time this accident happened my friend was telling me a woman and child was hurt. Yes, I mean at this accident. He was sitting by the window, and he thought it was a woman and baby. The train went between 250 and 300 yards beyond the crossing, and it may have been further than that. I mean the front end of the train went that far. I walked back to the crossing, but as for giving it an investigation, I did not. From the foot of the little hill going in the direction Mr. King was driving to the track, you can see quite a distance going towards Atlanta; but looking towards the way the train was coming, my recollection is that from the crossing a person could not see very far up the track on account of that curve. I don't think I went more than ten steps from the crossing on the dirt road. From that point I think I could see up the track some distance, but I don't remember how far I could see. The curve coming towards Atlanta was below this crossing, and my recollection is back towards Cornelia it still curved some. I could not say how far I could see north

up the track from that crossing, or ten feet from the track on the crossing, because I did not examine back that way. At the time this accident happened there was a neck of woods on the right hand side, close to the crossing. The dirt road went up a hill, and my recollection is down to the right of way is in small timber. Yes, that is on the left as you look north. After you get by that timber, and get down to the ten steps we are talking about, and looking up the track, that timber is to the left. It seems to me, as well as I remember the road, looking north, curves to the left; but, Colonel, I cannot tell you, for I did not examine that part of it.

(Witness is handed a plat.)

Standing on the crossing, and looking to the north, this makes the road curve a little to the right. Standing within the space of ten feet from the railroad track on that crossing, and looking north, there is no woods or anything else between my sight and that curve. The distance I went back from the track on this crossing, there was nothing to prevent me from seeing up the track almost half a mile, so far as I remember.

52 Redirect examination:

I think I went back from the track something like five or ten steps. I only went back a few steps. Below that crossing, I went back on the railroad. No, I did not step out from the track on to the dirt road to see how far I could see up the track at all. As I said, I never examined the road but very little. I never thought of it being called in question, or to give evidence about it. Yes, the dirt road makes a bend around a hill just before you get to the track. All that scope in here, between the right of way and here is small timber, and it runs up to where the road turns around that way. No, I could not swear how far I could see a train up to the time I got on the track, coming towards it.

Recross-examination:

If I was standing between the foot of that little hill and the railroad track, I think I could have seen a train, until this road makes the bend. Before the train got to the bend, the timber would prevent me from seeing it.

(Witness handed a plat.)

As well as I can see now that object there is the blow post. As I told you before, I did not examine north of the crossing up the railroad track, and don't want to swear how far I could see a train, because I don't know.

W. T. Dodd, a witness called and sworn in behalf of the plaintiff, testified as follows:

I recollect the occasion when Mr. King was killed, in 1903. I am Mr. King's son-in-law. I was driving a short distance ahead of his that day; something like 25 yards. As I went around the brow of that hill towards that crossing, I could not see up the track. I would

have to get within eleven steps of the track before I could see up it. When I got within eleven steps of the track I could then see up it about 200 or 250 yards. Beyond that, some timber shut off the view. Yes, the track curved. No, as I went along ahead of him that morning, I did not hear any train coming. The old man was in sight, behind me. No, I did not see any train. The first I knew of a train coming, I heard two short blasts, as they run into him.
53 It hit the hind wheels of the buggy. He had gotton the mule and the front wheels over, before it hit him. I saw him jerk up the lines and slap them down on the mule. The train knocked the old man down the road. He hit the sign board post. That board had on it "Look out for the engine" I believe. No, I reckon it was railroad crossing. That is the thing he hit. (To the Court:) He hit the post that holds up the sign, down about the ground. (To Mr. Arnold:) No, his head did not strike the post. He lived about an hour I reckon. The old lady struck in the road out in front, and the girl struck in the road, too. The girl hit the road on the flat of her back, I think. She was knocked up in the air a right smart piece; something like ten or twelve feet, I guess. I could not say how fast the train was running over that crossing, but I should estimate it something like fifty miles an hour. I could not tell that it checked up for that crossing. I did not hear them blow for that crossing up to the time I heard the two short blasts, just as they were hit. There was nothing that I know of to prevent me hearing it. No, I did not hear the rumbling and rolling of the train before that time. I have seen a blow post north of the crossing, but I didn't know how far it is from the crossing. Yes, we were driving on a public road. I was in a one-horse wagon, with my wife, with Irby and his wife; in the buggy ahead Taylor Dodd and his wife. My wagon and the buggy passed over the crossing without hearing the train.

Cross-examination:

At that time I lived a mile and a half from this Mag Wade Crossing. I have been been living there about six years. Mr. King lived about a quarter from my house. Both lived about the same from the crossing. Yes, he and I were familiar with this crossing. I did not have any time with me, but of course I knew that train came down in the evening. I knew about the time it came. I don't know whether Mr. King knew it or not. Mr. Irby and I were in the wagon together. Yes, I reckon Irby was familiar with the crossing. No, sir; Irby did not state to Mr. King, "It is time for 39." He did not say the "Vestibule is due," that I know of. If there was anything said about any train being due, I did not hear it. Taylor Dodd was in front of me. Yes, he was married that day. He was in a buggy, and we four were in the wagon. Mr. and Mrs. King and Miss King were in the buggy behind me. I trotted down that hill to the crossing and Mr. King kept up, I think trotted down that little
54 slant. No, Mr. King did not stop before going on that crossing. No, he did not stop and look, and did not stop and listen, if he had stopped and looked just before going on the crossing

within the eleven steps I spoke of, I guess he could have seen the train approaching. If he had stopped and looked, I guess it would give it time to run in sight, if he stopped any length of time, if he had stopped within eleven steps he could have seen a train coming from the north about 200 or 250 yards. This curve around here prevented him seeing it further, and there were timber on the opposite side that cut off his view; just woodland, woods grown up. There was a whole lot of woods there then; it is cleared off now. I don't know how many acres of it was there then. Above that crossing the land was Uncle Charlie Wade's. Yes, now there is a field on both sides of the road. There was not then. No, there has not been a cleared field there for years. William Cooley cleared it, since this accident. He cleared about a couple of acres there. Yes, he cleared what was in the way of seeing the train coming. Those two acres were in our way. It is owing to the thickness of the timber whether a train could be seen through the forest there. It was close and crubby then. It was about 20 or 30 feet high I suppose. I never could see in through there. With those woods cut away, and standing in that space of eleven steps, you could see a train approaching from the north until it turned the other curve. I guess that is 800 yards.

Redirect examination:

I know the condition in which this little girl has been since the accident. She has been very poorly. She has not been able to do any work within two or three weeks after the accident. She can walk something like two or three steps at a time. The effect of walking throws her into misery. She is very nervous. She has not been able to do anything about house work, or any domestic duties since she has been hurt. For the first two or three weeks after the accident she got about a little. After she took to her bed and since she has been using this roller chair, she has not been able to do anything. She was carried to her father's funeral on a spring bed.

55 Recross-examination:

I disremember how long after her father's death the funeral was had. I don't remember what time it was. It was in that same year. I disremember how close it was to Christmas. Yes, Miss Inez could get about for two or three weeks after the injury, but she was in misery, or seemed to be. Yes, she said she was. She did get about some in misery, yes. She did not do much of the domestic duties, if anything. She did not help cook to amount to anything. I was there mighty near every day right along then. I saw her trying to do something, I could not say what all. I saw her try to wash dishes, make up the beds, or something like that. She just kept getting worse and took to her bed.

Yes, there was a conference of doctors about her. That was right recently after she took her bed. It was first Dr. Hathcock and Dr. Quillian, and then Dr. Ham. The lawyers were employed to bring these cases very soon after the accident. I know when the lawyers were employed, but I don't know the exact date. I reckon it was

before Miss Inez took to her bed. The funeral occurred several months after the accident.

S. S. CARTER, a witness called and sworn in behalf of the plaintiff, testified as follows:

I reside in Hall County, Ga. I am acquainted with Mag Wade's crossing. It is called the Mag Wade crossing on the public road. Yes, it is a public road. It is traveled pretty publically. The railroad has a railroad crossing sign there. It has a blow post there and I have seen it. I don't know how far it is north of the crossing. I examined the cross- at the request of Mr. Thompson. It looks to me as though it was about 400 yards from the crossing. Yes, there is one south of the crossing, but I don't remember it. It is a pretty bad crossing. It comes down powerful steep, right down to the railroad, and I reckon, as well as I recollect, it would be about twenty feet, right where it makes a straight down before you get to the railroad, and I think if there was any shrubbery there, you could not see anything within twenty feet of the track. No, I did not examine it at any other time.

(Plat shown witness.)

56 Yes, the dirt roads falls down towards the railroad track right here. By the time you got within twenty feet of the track you could not see the track up here on account of the hill. I reckon in that space of twenty feet from the track, looking north, your view up the track would be limited to about 175 yards. You could not see further than 175 yards, because the track curves, and there is a little cut, and you could not see over it. It is cleared there now, and you can see further. When I was there it looked to me like it was cut down recently. Before it was cut down you could not see further than 175 yards; that is right. I went there to examine it with you and Mr. Howard Thompson, and at your request. The stumps looked fresh cut then; looked to have been cut about a month. I don't think there would be over two or three acres cleared there. In my judgment, with those trees there, you could not see over 175 yards up the track. I believe you and I and Mr. Thompson went there to examine it in October of last year. The man that got killed is my cousin. No, I did not telephone, nor send word to Mr. Howard Thompson to come up there after the accident. I don't remember when he come up there. The accident happened on Sunday. I was not at the inquest, and do not remember when it was. It was some little time afterward that I was up there. No, sir; I was not there the day the inquest was held. That day we were all standing there, I think, as well as I recollect, it is 90 steps from the crossing to the top of the little hill, where we could see Wade's crossing, and see both ways, and as we were standing there, a train blew. I took out my watch and looked at it to see how long it would take after it got in sight to where the accident happened.

Objection. Sustained.

Where I was, I could hear the train if it had not whistled, for I was on the top of the little knoll to look at the train. No, I did not

experiment from the public road as to whether you could hear it, or not. I have known old man King a good many years. I suppose he has been trading and doing business with me fifteen years,—I will say eleven years. He never did anything up there except farm a little. Yes, he did a little work on the farm. I don't think he had but two farms. I guess there was 200 acres in the two farms. I think he ought to be worth four or five hundred dollars a year to his family. Everything combined, I think he ought to be worth four or five hundred dollars a year to his family

57 Cross-examination:

It is a hard thing to get at what a man is worth. Yes, I am a batchelor, and am sorry to say it. I am not an expert on a husband, and father. Elimination, the question of affection for his daughter and fondness for his wife, and getting down to what he was worth in work, in dollars and cents, I don't suppose he would be worth that much, for something a man is not a good trader. He would not have to be worth much to be as good a trader as I am. I could not tell as to him being infirm and ailing for the past twenty-five years. He would come there and buy from me for himself and for his renters, and when the year was up he would pay me. I could not tell very much about him, except how he did business with me. When Mr. Arnold and Mr. Thompson was there at the crossing, it was before I was a witness at Clarkesville. I was a witness there at the September —, and it was before that I went up to see the crossing. Yes, it was in the early fall of last year. The Clarkesville Court, convened on the first Monday in September. No, I did not measure any of the distances, or the distance from the railroad tracks to the foot of this little hill; I just looked at it. No, if a witness should swear that he measured it, I would not put my judgment against his measurements. Yes, there has been clearing done there. I don't know whose land it is, but Mr. Wade's run up there. I suppose the right of way is one hundred feet wide. The clearing was to the right of the right of way; the road, all the way down to the hill, has been cut down. Some of the clearing that I thought was fresh was on the right of way, and some of it not. Clearing on the right of way is done in the summer, I think. Yes, they cut the right of way off in July and August. I did not pay much attention to the clearing; just noticed that clearing below there. As I saw it, in the condition it was just before September of last year, by standing on the crossing where Mr. King was hurt, and looking north, I could see up the railroad for half a mile; but if that had growed up I could not. Yes, I could, the way it was in September when I was there. Yes, I live at Lulu and am pretty familiar with trains. I don't know of any train that does not make a noise. They all make a noise. A train running from forty-five to sixty miles an hour, makes a muss that can be heard a considerable distance. The noise travels faster than that speed.

58 Miss Inez King, recalled by plaintiff, testified as follows:

No, sir; before this accident I had never had any interior or internal trouble; no pains in the abdomen. Since this accident I

have had pains inside my body. I have a kind of pressure all the time; a kind of bearing down pains and aching. Since this accident, at the time of my monthly sickness, I have more trouble than I had before.

Cross-examination:

Before this accident I had not been treated for this trouble; these pains at my monthly periods. My mother never gave me anything for that, and I was never treated by any physician at all. At those times, before I was hurt, I did not suffer anything at all compared with what I do now. I did not suffer but very little I might have been a little weaker at that time, than at other times. Before I was hurt, I had not taken anything for those pains; no tea or medicine at all that I know of. Yes, I guess at some time in my life before I was hurt, I had taken some medicine. No physician ever gave me any medicine. Yes, in January, 1904, I was examined by Doctors Hathcock, Goss and Ham, and I have not been examined by Doctors Goss or Hathcock since. Doctor Ham has examined me since, I suppose, but no other doctor.

(To Mr. ARNOLD:) I wore the plaster paris jacket ten months, day and night. That was around my body and spine.

(At this point, on request of counsel for the railroad company, defendant, and without objection on the part of plaintiff's counsel, an examination of the plaintiff Inez King is to be made by some physician or physicians not interested in this case, upon the adjournment being taken for dinner.)

TAYLOR DODD, a witness called and sworn in behalf of the plaintiffs, testified as follows:

My name is Taylor Dodd, and I was one of the parties driving over the crossing the day Mr. King was killed, and his wife and daughter were hurt. I am a little relation to Mrs. King; about third cousins. No, I had not been to church that day. I had been up in Habersham County about Clarkesville. I got married that day.

59 I was driving in a buggy ahead of Mr. King, something like thirty or forty feet. I did not see or hear the train, as I passed over the crossing. I had gotten about 60 or 75 yards over the crossing before I knew of any trouble behind me. I heard the engine give two short blasts and looked back, and as I looked around I saw it hit them and knock them off. It hit the hind wheels. The engine must have been fifty feet, something like that, from the buggy when it blew. I did not hear any crossing signal, or any kind of warning, before I heard it give the two short blasts. I don't think it rung the bell. I did not hear the noise of the train up to the time it gave the two short blasts. Coming around that hill south towards the track, and something like fifty yards from the track, you can see up the railroad, but there is a space of thirty or forty yards that you cannot see the railroad until you get within a few feet of the track again. In that thirty or forty yards as you approach the track, there is a little mound there and some bushes that cuts off the view of the railroad. I never measured the distance, but I suppose it is some-

thing like twenty or thirty feet before you can see up the track again. I could not say positively how far I could see up the track then. Yes, the track curves all the way up. It is a reverse curve, you might say, to the right. It curves out of sight in fifty, or may be one hundred yards. There are no trees on the right hand side looking north now; there was then. I do not know that those trees would have any effect on the view of the train as it swept around that curve, I really don't know whether you could have seen the train at that time or not. It is now cleared to the right of way one hundred yards or more. Well, the picture you show me is a fairly good representation of the situation back towards the way Mr. King was coming down to that crossing. The buggy circled around that group of trees. All this over here is now cleared, but it was then saplings and trees. Yes, the other picture represents the country where they have a borrow pit. Yes, the man taken in this picture sorter favors Mr. Howard Thompson.

(The first picture exhibited witness was No. 7 and the second one No. 4.)

The cut there is twice as high as Mr. Thompson's head. Picture fairly represents that crossing with a man standing on it, but it looks to me as if this side over here is about level. Outside of that it represents it very well. Coming down to the track, that clump of trees were to the left of the track. Coming around this hill down to the crossing, Mr. King would *have* have any view of the track at all from the top of the hill; and not until he got to within twenty or thirty feet of the track. When he got to the crossing he could have seen up the track a hundred yards, I guess. Picture No. 5 fairly represents the way the dirt road goes over the crossing. This picture looks like a representation of the road before you get to the crossing. Yes, you could get a glimpse of the track back here. That train must have been going forty or fifty miles an hour. I could not tell that it checked up for the crossing. The engine went something like 200 yards beyond the crossing before it stopped. No, of course I did not measure the distance. Yes, the back coach cleared the crossing before it stopped, a car length or so. I did not count the coaches in the train, but I think there were five or six. When I got to him the old man was living. I stayed about twenty or twenty-five minutes, and left him living. I saw the little girl thrown up higher than you could reach. Yes, I mean in the air. She must have been thrown up in the air twelve or fourteen feet. I cannot say positively how she struck the ground. She struck nothing but the ground, that I know of. I have been at her house a time or so since the accident. I found her then in about the condition you see her now. Before the accident I never was about her much, but I guess she was always reasonably stout.

Cross-examination:

At the time the accident happened, I had passed the crossing about fifty or seventy-five yards. I was ahead of Mr. King something like 50 or 60 or 75 yards, along there; I never measured it. Will Dodd was between my buggy and King's buggy, in a wagon. Yes, my

buggy had crossed, and Will Dodd's wagon had crossed, and then came Mr. King. I was driving tolerably peart, along in a trot. I reckon I left them behind a little. I passed them on the top of the hill, around on the other side of the railroad, and they started out in a trot after my buggy. Yes, from my buggy to King's buggy being about 75 yards, it was about as close as we could comfortably drive. They were trotting to keep up with me, I expect. No, I did not hear the engine whistle until I heard those short blasts. No, I was not listening. Yes, it might have whistled, but I did not notice it, though. I was not conscious of hearing it. All I say is I did not hear it. I was living in Banks County at that time, five miles from the railroad. At that time I had never lived nearer the railroad than five miles. In coming in the direction Mr. King was
61 traveling, for some time he was traveling in a southerly direction, with the railroad to his left. He went on the top of the hill, then down the little hill to a flat, and then along the flat to the railroad crossing. Yes, on the top of the hill there was a place for a certain distance that he could not have seen the track if he had looked. The distance the track would be concealed from his view would be something like 40 or 50 yards, I guess. The 40 or 50 yards ends about twenty or thirty feet from the railroad track. In other words, after he got within twenty or thirty feet of the track, he could see up the railroad a piece. Yes, you could see it anywhere on that 20 or 30 feet by looking. On looking up the center of the track north, I would say he could see a hundred yards up the track. It curves all the way there. I have passed up there several times and know it is curved. Standing at the point you indicate on this plat, at the center of the track, the curve of the road hinders you from seeing up the track seven or eight hundred yards, and there is a bank or a cut about there. No, sir; I don't know the height of an engine, and don't know the height of the little bank I was speaking of. The crossing where Mr. King was hurt is where the man is standing on the track in this picture. Yes, if a man was standing on that crossing as it appears now, then he could see over any obstruction that was in the way, and see up the track. Yes, the road curves the other way after you get by Wade's house; it makes another curve. I don't know the distance Mr. Thompson is standing in this picture about the crossing, but something like forty yards, I suppose. Yes, he is standing on the west side, the way Mr. King was going, looking at the crossing. Between him and the railroad track is the borrow pit. That borrow pit is about fifty feet broad. No, there is nothing in that borrow pit to prevent a man from seeing. It has had dirt taken out there, and reduced the ground almost even with the top of the rail. There is a bank between the borrow pit and the crossing. Within that twenty feet from the railroad you can see up the track, and that borrow pit aids you in seeing; yes. I have known Mr. King ever since I was a chuck of a boy. He was able to work and did work. I guess he made a pretty fair hand. I have seen him at work knocking around. I lived four or five miles from him. Yes, he made a crop, but I cannot say how much land he cultivated. He rented some of his land and worked some. He had two places. I reckon portions of them joined. Yes, the two parts joined at one

place, if I am not mistaken. I saw Miss Inez King at her home about a year ago, and she was in about the fix she is in now.
62 I was over there some time last summer, and then I was there last Sunday. Since she was hurt I have seen her two times, and she was in about the same condition as she is now.

Dr. E. P. HAM, a witness called and sworn in behalf of the plaintiffs, testified as follows:

I am a practicing physician and have been practicing about eighteen years. I practice at Gainesville. I have treated Miss Inez King, the plaintiff. I first saw her about six months after she was hurt. I then found her in a right nervous condition, and a little anemic. She has since then remained in practically the same condition. I see no difference now, than then. I put her in a plaster cast, and kept her in it for ten months. The case was put over her spinal column, to relieve the weight principally. This condition by medical men is called neuresthenia. The whole body is affected by this neuresthenic disturbance. She is not able to walk very far. If she attempts to walk, she gives out. She apparently cannot stand very long at a time on her feet. Violence or traumatism will produce these conditions. I should say yes, to the question, "whether or not a fall, or rather a blow from a train on the hind wheels of a buggy which threw her up in the air anywhere from ten to twelve feet, and caused her to fall on her back on the ground, could produce such shock and injury as could result in that condition." To the hypothetical question, "Suppose this young girl at the time of the injury was fifteen years old, and suppose she had been in average health up to that time, milked, did work about the house, did work about the farm; made up the beds and cooked and was as active as a girl of that age usually is; and suppose she is riding in a buggy and that buggy is stricken by a train, and she is knocked out as I stated a moment ago, and falls upon her back, is carried home and develops pains up and down the spinal column; develops pain in the side; and suppose for two or three or four weeks she drags around and undertakes to do the best she can, does some little things, but the pains are increasing all the time, and nervousness is increasing all the time, and at the end of four weeks she gets to where she cannot go, and has to take to her bed, and after that has to take to that roller chair to move around, and she cannot walk without having a nervous breakdown, and cannot stand without the same thing; and suppose she suffers continuously up to now, with pains
63 in her back and head and at periods of menstruation is far worse than before, state whether such a condition as I have described, and as you find her in, might result from that accident?" I would say I think so, yes. Taking the history of such a case as you put, I could not attribute it to anything else. Yes, I have made a digital examination of her up and down the spinal column, and found a tenderness, which indicates an irr-ation of the spine. The spine supplies the whole body with its nerves, nearly. The nerves come down the spinal cord. This inflam-atory trouble has a reflex action upon the brain. I don't know what it would result in,—it

might result in most anything, nearly. I heard the young lady testify about the bearing down pains she had. To your hypothetical question, as follows, "Suppose she had never had any womb trouble before, and was only fifteen years old, unmarried, and never had any children or anything to enlarge the womb to make it heavy, and suppose after this accident, she had bearing down pains, and had also greater irregularities at her monthly period than before, what would that indicate?" "I would answer, it would indicate that the accident caused it." There is some displacement of her womb. A great many children have womb trouble. The birth of a child is a great strain, and liable to result in injury, and even, if there is no injury, it makes the womb heavy. In a young girl the womb is small, and is not as liable to injury as in an older person. In other words I would not look for a prolapsed womb in a girl fifteen years old, as I would in an old woman. A fall can produce a prolapsed womb. If she had never had any trouble of that kind before this accident, and afterward her present condition developed, I would naturally think the injury produced it. This abnormal condition of the womb may have nearly any kind of effect on the nervous system of a woman. I have never seen anything about this girl on any of my visits that would lead me to believe she was fei-ning. I think these conditions as stated by the young lady really existed. Her condition, consequent upon an injury, is well known and recognized by the medical profession. Yet it is a fact that she might still be up and about for three or four weeks, and then get down as a result of an injury of the kind you relate. I do not think she is in a physical condition to do any work of any sort now. Her appearance is not that of a healthy person. Taking the history of her case, the injuries occurring on the 14th of October, in my opinion there is apparently no abatement of her troubles, and, if it keeps on
64 it will continue for ever. She is apparently the same as when I first saw her, and there is no change for the better that I can see. Conditions of this sort frequently last for a life time. You might put a plaster cast on her. I had one on her for ten months. You might relieve her nervousness some by medicines, but, that is just temporary. If you could get her to stand up, there is still no opportunity to give her exercise. As to the examination of the doctors a few moments ago, we found her practically the same as when I first examined her; I see no difference, unless perhaps a little more nervous. Yes, I have seen her when she had these nervous spells upon her, and at those times she jerks all over, and is apparently very nervous. Excitement apparently produces that condition upon her. In a case of this sort, there is no way to diagnose it, except to take the history of the case.

Cross-examination:

Yes, by that I mean in a case of this character, a doctor cannot tell whether the patient is suffering with the symptoms they claim absolutely. They must rely a great deal upon what the patient says about it. I have forgotten the date when I first saw Miss King, but I believe it was in January, 1904. That was in company with Doc-

tors Hathcock and Goss. *Me*, Howard Thompson went with me. He employed me to go and see her. At that time she was being treated by Dr. Hathcock. No one has been paying my bills. I have not sent any bill to Mrs. King. I am looking to Mr. Thompson for the payment of my bill. At the time we were all there, we made an examination of her together, and we agreed as to what the symptoms were then. She then had some displacement, and anteflection of the womb; a bending forward, I think that is what it was. I think that is all we then saw. That I think was agreed to be all the trouble we could then discover. Yes, we agreed upon a course of treatment. At that time I could not tell whether the womb trouble was of recent origin or of long standing. Yes, it is a fact that we find a great many girls of her age who have these troubles found in her, who have never had a railroad accident. Yes, I think they are quite common; common to girls who have never married, and who have never given birth to a child. Yes, it might be due to jumping, horseback riding and things of that sort, or they might have been born that way. Yes, when we examined her, she was anemic, and the only local trouble we could see was the womb trouble. Oh, yes, the same spinal trouble was there, the tenderness was there.

65 Yes, I found the spinal trouble then. Yes, we agreed upon a spinal trouble; a spinal irritation; a tenderness along the spine. Yes we agreed on a treatment for it. I don't know now what treatment, but I think we gave her some nervines, some bromides perhaps. I think we all prescribed it. I don't know whether I got the medicine in Gainesville or not, but I think I did perhaps. I next went there some little time after that. I think it was longer than a month or two months. I went the next time at Mr. Thompson's instance. I don't remember whether I put the plaster cast on that time or not. I don't remember how many trips I made, but I have seen her four or five times in that period. One time I put a plaster jacket on her, yes. I don't remember when that was or what season of the year it was. Dr. Quillian was with me I believe when that was put on. Neither Dr. Hathcock or Dr. Goss was there. I don't know whether she was Dr. Hathcock's patient or not. I think she was the first time I went. At the time I put on the plaster jacket, I don't think Dr. Hathcock was notified. In putting it on we suspended her to the ceiling. The nail broke, but she did not fall; just dropped a little, but it did not amount to a row of pins. Her feet were on the floor, but we pulled her up to relieve the pressure on the spine. When the nail broke, some one was holding her. No, it is not true that she fell, and some one caught her, for we never got her off the floor. It was a nail that broke. We had a little trapeze thing, a little harness, and the nail was rusty. Yes, it was her weight that broke it, but there was not fifteen pounds pull on it, I don't think. We put on the plaster jacket and it was on for eight or ten months; something like that. She said when she was wearing it, that it did her some good. I have done nothing for her since the jacket come off, except give her these little nervines. When a person gets a lick that is going to disturb the spinal cord, it might develop in several days afterwards. You would not necessarily see symptoms of it at

the time the shock was sustained. There might be some blood vessels ruptured, and it might take several days to develop; depending on the injury. To put her in the condition she claims to be in, would not necessarily take a lesion of the spinal cord, but an irritation of the cord. Yes, concussion would produce it. In this case, I would say irritation caused the condition. Concussion is not necessarily produced by lesion; it might be a hemorrhage. I don't know what produced this hem*m*orrhage. If it was concussion, I think you would see the symptoms at once. If it was hem*m*orrhage it might be several days before you would see the symptoms.

66 If it showed up in several days, I suppose the first symptoms would be irritation about the spine; numbness; difficulty of motion and sensation. I don't see why any trouble to the spine should be either progressive, or it gets well. You can have an injury to any joint in the body, and it might be a permanent affair. If a person has an injury and is up a week, and then it develops, I mean to say it might go on and reach a certain stage, and then stop. That must be her position in this case. I think we three doctors did discover this neuresthenic condition at the time we examined her in January; she was quite nervous then. Yes, that was some four months after the accident. Yes, that was sufficient time for it to develop. I don't think she was nervous enough for me to pronounce her case needing a jacket, but we spoke of putting it on then. Yes, I think I spoke of it then. A nervous person might remain continuously in the house whether she had any spinal trouble or not; and I don't see how she could get well on a roller chair, or in a bed. I think that sort of a life would leave her limp and weak. The effect would be, if she attempted to stand or walk, that she would become nervous from it. And that would be true, whether she had any spinal trouble or not. I should think it would be true, that the nervousness I find in her now would be natural, if she had been in the house for two or three years, and had to come to the court house and be examined by a lot of physicians. Yes, at the time I made that first examination, I made a digital examination. That would be very exciting to any modest young girl, yes; and would produce nervousness independently of anything else. Putting the plaster jacket on her should not have made her nervous. No, sir; stringing her up there, and putting that thing on would not make her nervous. I put it on over a gause undervest. Why, getting to her next to a gause vest should not make a modest girl nervous. That is my experience; it ought not to make her nervous.

Redirect examination.

By Mr. ARNOLD:

Yes, I believe we went to put the jacket on and found her so nervous that we could not do it, and had to come back again. I don't think we put the plaster jacket on her the first time I went there; I don't think she was in a condition to have it done.

67 No, a person having the spinal trouble she had, and feeling as she does, cannot get around very well. She has no other alternative than to use the chair in moving around. When

the spine is in the condition hers is, she must keep quiet. Dosing her with medicine has not done her any good. I think the plaster jacket was the best thing I could do for her, to support the spine and let it gain strength. If it was going to recuperate and get strong, it should do it in that ten months. A lesion is usually a broken place; some abrasion, or something of that sort. The full effect of an injury is not felt right at the time, but starts to work inflam-atory processes, and does not reach its ultimate result at once. Yes, frequently you may be looking at a man, and the next minute he may drop dead, and you could not tell there was anything the matter with him. Yes, it is true that a blood vessel may burst and keep seiping out until it reaches a broad enough area to produce death. There are prominent conditions of physical injury which do not manifest themselves to the eye, and yet the injury is just *a* [as] palpable, as if we could see it. The business of the doctor- is to treat those cases the best they can.

Recross-examination.

By Mr. STRICKLAND:

Yes, there is a character of nervous trouble known by doctors as "railway spine." A railway spine is one of those cases that develops an inability to walk and an inability to get about; extreme nervousness. I don't know about these cases being frequently brought on by the necessity of a railroad case. I don't known about the necessity of a case *for* an injury will have the effect of frequently keeping a person from recovering. Within my knowledge of medicine there is nothing that can be done, or no treatment that can be resorted to to relieve her.

TAYLOR DODD, recalled by plaintiff, testified as follows:

By Mr. ARNOLD:

Yes, I have examined this plat tacked up there. It does not show the curve in the railroad track as it looks to me. The curve looks *to* [too] straight to me. The curve in this other plat comes nearer presenting the curve to me.

68 Cross-examination.

By Mr. STRICKLAND:

No, I am neither an engineer nor a surveyor. No, I cannot state that these two plats are on the same or a different scale. No, if you take a curve drawn on a scale of twenty feet to an inch, and one drawn ten feet to the inch, they would not look alike. I think the curve drawn twenty feet to the inch stretches it out and makes it look straighter. I suppose the engine of this train went beyond the crossing about 250 yards before it stopped. I think the last car in the train went about a car length over the crossing. On the other trial of this case, I think I said the last car went a car length or two beyond the crossing.

C. D. CAGLE, a witness called and sworn in behalf of the plaintiff, testified as follows:

By Mr. ARNOLD:

Yes, I have been sworn. Yes, I know the Mag Wade crossing involved in this case. I have been along there a right smart, before Mr. King was killed. A person approaching the railroad track on the dirt road from the north, after he gets over the top of the hill don't have much of a view of the track north, until he gets to the crossing. When you get where you can see up the track, I suppose you can see up the track fifty or sixty yards; something like that. You must get — ten or twelve feet of the crossing before you can see up the track. When you get in that space of ten or twelve feet, I suppose you can see betwixt two and three telegraph poles. The distance between telegraph poles is about seventy yards. Yes, I suppose you can see then something like 140 or 200 yards. The track makes a curve which prevents you seeing further. Then behind that curve there is an embankment; and there are some trees on the left hand side of the track as you come down. In the picture you hand me, it seems to me this has been cleared off here. That is the way it is now. Before it was cleared off, the trees were along here, in this picture No. 5. It seems to me they come closer to the railroad track, than shown in this picture. With the trees and the cut there, you could not see more than fifty yards, or something like that up the curve. Yes, those trees have been cleared away. I have been to King's house several times since the accident. I could
69 not say how many times but lots of times. Yes, I have seen this little girl when I have been there. When I was there she was on the bed, or in the roller chair. Her appearance is somewhat better now, than it was then. I saw her just after the accident.

Cross-examination.

By Mr. STRICKLAND:

I live at Lulu. I run a livery stable and a farm. I could not tell you how I came to be a witness here about that Mag Wade crossing. I drove Mr. Thompson up there when Mr. King was killed, and with Dr. Oslin that day after he was killed It was Dr. Oslin, of Gainesville. He used to be a railroad surgeon. I don't know as he was then. We first went to King's, and then up to the crossing where they held the inquest. No, Mr. King had not been then buried. Well, I don't know what Thompson was doing up there; suppose he went there as an attorney. Yes, I carried up the doctor and the lawyer before the old man was buried. I think it was Thompson hired me to go, or Sandy Carter, one or the other. We went from the house to the inquest, which was held. I was driving all the time I was there. The only connection I had was driving the team. Yes. I stated I thought it was about ten feet from the railroad track to where you could see up the track at all. Yes, I stated there was a place back of that ten feet where you could not see the train; that was a space of some forty, fifty or sixty yards;

something like that. After you got close to the track you could see the train. After you got — ten or fifteen feet of the track, you could see the train. After you got within the space of ten or fifteen feet of the track, there is something that would obstruct the vision of a train, a half mile up the track. I do think the woods would obstruct the vision on either side. No, sir; the line of vision is not entirely within the right of way for nine or ten hundred yards, but goes outside of it. The line of vision would go through some woods, or strike some apple trees, or something of that kind. Well, I suppose it would strike woods, not apple trees, for as I understand it, the railroad is sizzag or wobbling; I mean it curves both ways. The first curve is to the east, and the next curve to the left or the west. I don't think the place where the curve changes from one to the other, is half a mile from Mag Wade's crossing. Yes, it is above old man Charles Wade's house. No, I don't think it is true that you could stand at this crossing and see a train going on this rail-
70 road, north of old man Wade's house. It seems like I have tried it. I think it curves too much, and you will remember there are some bushes coming on the right hand side. I don't think you could see it to Wade's house. I think you might see a train fifty or seventy-five yards this side of Wade's house. I don't think Wade's house is half a mile from the crossing. The bushes and trees I spoke about as preventing the view of the train is on the right hand side of the track. There are some on the left hand side, but they would not interfere with the vision. The trees I referred to is off the right of way, right in the bend of the curve. The right of way is I suppose fifty feet from the centre of the track. These trees were common sized saplings. I suppose about as big as my thigh. They were pretty thick, but I could not tell you how tall. I don't know how large an area they would cover. I guess I have been there a hundred times, I never measured the distances; no, I am just guessing at them.

Redirect examination:

Yes, I heard Mr. Carter saying something about Thompson being up on 12 to attend the inquest. Mr. Carter saw Mr. Thompson after he got there. Mr. Thompson was at the inquest and was present when the witnesses were examined. Mr. Carter is a cousin of the dead man, King.

By Mr. STRICKLAND:

Ed. Quillian was there for one, examining the witnesses. The coroner it seems did most of the examining, but some lawyers asked some questions. I cannot think of the name of the coronor. I think Mr. Thompson asked a few questions. Quillian asked some questions, and he was the railroad lawyer, or I understood he was. I don't know when he became a railroad lawyer. This happened in 1903. I never saw him in a railroad case, but I understood he was the railroad's lawyer. He came with the railroad crew.

M. A. TERRELL, a witness called and sworn in behalf of the plaintiff, testified as follows:

By Mr. ARNOLD:

I was not right *right* present at the place where Mr. King was killed, but was about 300 yards off. I did not see the killing. I did not see the train as it passed over the crossing,
71 but saw it after it had crossed it. I saw where it stopped, I suppose the engine stopped about 300 yards from the crossing; it passed me a little bit before it stopped, but I don't know how far. I did not hear the engine blow. I did not hear any signal given for that crossing at all. I don't know how fast the engine was running.

Cross-examination.

By Mr. STRICKLAND:

I was in the wagon road. I was south of the crossing, and while I cannot be positive, I suppose I was about 300 yards from the crossing. I was ahead of Mr. Dodd and Mr. Yarbrough, who were travelling that road. I was walking. I saw Taylor Dodd down the road. I don't know how far ahead I was when the train passed. I did not pay any attention to the rear end of train, and don't know where it stopped. I don't know how many coaches were on that train.

W. S. WRIGHT, a witness called and sworn in behalf of the plaintiff, testified as follows:

I recollect the day Mr. King was killed. I lived near there. The engine went somewhere 750 feet below the crossing and stopped. I saw it when it stopped. I did not hear the engine blow for that crossing. I have stood on that crossing and looked to see how far north I could see up the track. Standing right in the middle of the track, you can see up about 180 yards. I never measured it, but counted the rails. The curve in the road then cuts off the view. The track curves around to the right. On the right hand side of the road it was in woodland, at that time. It has been cleared off since. I think Mr. Colley cleared it. I lived I suppose about a quarter — from the crossing. I have been in the house of these people since the accident. I have seen this little girl. When I have been there sometimes she was in bed and sometimes in the chair she is now. I cannot tell you how many times I have been there since the accident, but several times. I never kept count of the times.

72 Cross-examination.

By Mr. STRICKLAND:

At the time of the accident, I was at home. I live on what we term the south side of the railroad, or the southeast side. I live on the same side as the wagon road runs. The wagon road runs between my house and the railroad. I live about a quarter — from the crossing. I was sitting on the porch when the

train passed. I did not hear the engine blow the crossing signal. Of course, the train may have blown for that crossing many times, and I not notice it. My mind was not directed to the train at all. No, there is no reason why I should have noticed it at that time. My attention was attracted to the train by the two short blasts; the unusual blowing attracted my attention to it. No, sir; you cannot see the train when it blew, from where I was sitting. I went down there, but it was some little time afterwards. I found out what was the matter before I went. I did not go for more than fifteen or twenty [minutes] after, but I could not say how long. When I went, I went to where Mr. King and Mrs. King and the little girl were. Yes, the engine went about 750 feet beyond the crossing and stopped. I don't know where the rear end of the train stopped, for I paid no attention to it. My house sitting in the condition as it is, and the railroad inclined to make a curve and where I was sitting, the engine come in sight, and rolled down and stopped. I counted the rails. A rail is thirty feet or was at that time. There is a space coming from the west before you get to the track, that you can see up the road. Yes, that is coming from the direction Mr. King was coming. Of course, the farther you get from the railroad, you cannot see, and then there is a cut there that prevents you seeing. I think the space where you can see up the track is about eleven steps long. Yes, that would be about thirty-six feet. Yes, the road curves to the right as you look towards the north. The further you get away from the track the further you can see up the track, that is, until you get where the view is cut off. Standing within the space of twelve steps, and at the expiration of the twelve steps, I did not examine to see how far up the track I could see. I could not swear as to that. Yes, there is a point where the track gets out of the line of vision, in consequence of that curve. After that time, I went there and examined to see how far you could see an approaching train, and you could see the train approaching above there twenty steps. I believe it was twenty steps from the railroad track
73 you can see the train approaching. I don't know that you could see it for half a mile, for I never measured it, but I suppose it was something like that. I suppose if I had looked, I could see a train there for half a mile, although, I never measured it. Standing on the track at that crossing you could see the track for 180 yards, but I don't know how far you could see a train. Of course, a man could see a train when he could not see the track, but I don't know how far up he could see the train, for I think the woods would cut his view of the train off. I don't know whether, standing on the track there, you could see a train a quarter or a half of a mile off, regardless of the woods, for I never examined that. The woods were cut down not so powerful long after that, and I never looked to see the exact distance. The woods belonged to Mr. Charley Wade. There was a good big territory of woods there then. From this crossing to the field where it was cleared, I would guess it to be 150 or 200 yards; that's mere guess work. The land beyond this *place* of woods I am speaking about, was cleared land and in cultivation. That strip was still east, off the right of way. The

woods was reasonably thick. I could not say whether you could see through the woods or not. I don't remember. Why, of course, sound would go through there. (Picture is handed witness). Yes, I see a building up there. The first house in the line of vision, I suppose would be Mr. Mag Wade's. Mr. Charley Wade is the nearest man, and he is nearly at the railroad, but not just on it. No, he is not on the right of way. I don't know that there is another house near the right of way, which would be in view of the instrument that took this picture. It must be old man Wade's house, unless it [is] his son's just a few steps from it. I don't think his son's house is under the hill from the instrument. I am under the impression that it is old man Wade's house, from the fact that this must be the old shop house there. I could not tell you if the timber would be in the line of vision of a man coming to the crossing, as far as old man Wade's. If I was standing on the west side of the crossing, anywhere within the ten or twelve feet and looking up north, there is no timber now to cut off the view. So far as the timber is concerned, of course, it would not interfere with the view as far as old man Wade's, because you are looking up the cleared and trimmed right of way. This timber in the picture seems to be standing above old man Wade's house. Taking the picture and looking towards the north, as the picture appears, I see some timber, but I could
74 not say from the looks of the picture whether it is below or above Mr. Wade's house. Yes, the instrument has got to stand south of the crossing, to take this picture. I could not say whether that timber could be taken beyond Mr. Wade's house or not. The timber I was speaking of was near the dirt road. Of course, of this is the timber coming to the right of way, it is the timber I am talking about, of course. Standing ten or twelve or twenty feet from the railroad track at that crossing, I don't know that that timber is in the way of seeing to old man Wade's house; I suppose you could see something near that far, but I never examined that, and, therefore, cannot answer that question positively.

Miss BONNY DONAHOO, a witness called and sworn in behalf of the plaintiff, testified as follows:

By Mr. ARNOLD:

I know this young lady here, (plaintiff). She is my aunt. I remember when she got hurt in October, 1903. I was down in South Georgia, at that time. I got here on Wednesday, after the accident. The accident was on Sunday, and I got here on Sunday. I saw her at her home, at that time. She was not in bed when I first went there. She was in bed a part of the time, and sitting up a part of the time. Yes, I was about the house for quite a while; I suppose for two weeks, or something like that. I helped about the domestic work of the house. I helped milk the cows, helped cook, make up the beds and wash the dishes, nurse the baby, go down to the spring for water. After the two weeks I stayed there, I then went home. I came back there again in April, and then I stayed there seven months, and did the same sort of work I did

before, all the time I was there. This plaintiff was perfectly helpless almost, the seven months I was there. She was in that chair, yes. She did not do anything while I was there. She was in that chair, or in bed all the time. I am sixteen years of age. I am pretty near as old as my aunt. She is thirteen months older than I am.

Cross-examination.

By Mr. STRICKLAND:

I arrived at her house on Wednesday after the accident, and when I went in she was sitting in the room. I stayed there then something like two weeks. During that
75 two weeks, Miss Inez was in bed part of the time, and part of the time up. She did not do anything while I was there. No, she did not help cook, make up the beds, clean up the house, milk the cows, didn't go to the spring, nor nurse the child, she didn't do anything. She was in bed most of the time. That was the first two weeks after she was hurt.

Redirect examination.

By Mr. ARNOLD:

No, I don't know what she did the first two or three days after she was hurt.

Mr. ARNOLD: I now offer in evidence a certified copy of a record from Habersham Superior Court. I wish to offer the indictment and conviction of engineer Dewberry, for a misdemeanor, in failing to blow, check and keep checking, when approaching a public road crossing, under the statute.

Mr. STRICKLAND: I object to that, on the ground that the case is now in the Supreme Court, and possibly any such conviction will not stand.

The COURT: The objection is sustained.

Counsel for plaintiff now reads in evidence the depositions of the following named persons, to-wit, Mrs. Taylor Dodd, Frank Yarbrough, Mrs. Frank Yarbrough and Mrs. Harriett Masters. To the reading of the last named deposition, the defendant objects on the ground that the witness was not sworn, and it is not evidence; that the administering of the oath was not waived. The ruling upon this objection is reversed for the present. The objection was afterward withdrawn.

Counsel for plaintiff offers in evidence the six photographs heretofore identified and used in the trial. These are admitted without objection.

Counsel for plaintiff next offers in evidence the Carlisle and Mortality Tables found in the 70th Ga. report. These are admitted without objection.

Here the plaintiffs rest their cases.

76 The following agreement as to what H. N. Maston, if present would swear, was read to the jury:

"H. N. MASTON will swear that he went to King's residence about three or four weeks after the accident and saw Miss Inez King walking about the premises carrying a baby in her arms. He saw her coming from the spring with a tin bucket in her hands."

C. W. HUGHES, a witness in behalf of the defendant, being duly sworn, testified as follows:

By Mr. STRICKLAND:

I have no connection with the Southern Railway Company, but had at one time, being a civil engineer, Charlotte Division. As such civil engineer, I made this map. This map represents the alignment of the main line of the Southern Road at mile post 576, and also the approximate alignment of the public road along the line there. This includes the crossing, which is right at this end of the map. This shows the proper curves of the railroad at this point. Yes, the dirt road is approximate. The railroad is accurate the curve being taken by a transit. This Map No. 2, which you show me, represents the same conditions as the other one, except that it goes a good deal farther. That one simply represents Mag Wade's crossing and the first crossing north of that. This one takes in more territory than the other one. The curve on both maps is the same, but on the map it looks quite different, because the scale on one side if fifty to the inch and on the other is two hundred feet to the inch, which makes the curve here look sharper than on the other. I don't remember the date on which I made the survey, but the date is on the map, right down at the title, "August 25th, 1904." At this crossing the dirt road coming from the west is level, nearly for about sixty or sixty-two feet. It is level to the foot of the hill, which is about 60 or 62 feet. Yes, that is on what we could call the west side. Standing on the dirt road near the track, and within that 60 feet you could see up the railroad track, north, for a considerable distance; I should think at least a thousand feet, and perhaps 1800 feet or more. At the point where you are not able to see [illegible] rack further, you are prevented, because the road runs around [illegible] a little hill, and that little hill obstructs the view. Yes, you could see a train on that track further than that. As well as I remember, you could see a
77 train on the track as far as the other crossing, up perhaps a half a mile. I saw a train coming the day we were there. It was approaching, and I saw it coming for a considerable distance up the track, and as well as I remember I saw it just after it blew the signal for the other crossing, about a half mile north of this crossing. I was then standing about thirty feet from the track, in the dirt road and on the west side of the track. Yes, on the side Mr. King was coming when he was hurt. We were going to take the train for Atlanta, and we were all prepared to board it, and I was standing some little distance from the track. Yes, I heard the train coming very distinctly; the rattling of the train. I heard it when the crossing signal was blown, which attracted my attention, and then I heard it coming for several minutes. As to the distance, I should say two miles. I did not notice any point where I could not hear it, from

that time until it reached Mag Wade crossing. Standing on the dirt road west from the railroad track and near the foot of the hill here, there was nothing to obstruct the line of vision looking at a train coming on the railroad from a northerly direction, except some sedge brush. There was some scattering bushes there, but nothing of any consequence. No, I do not think the line of vision would go beyond the right of way, standing at the foot of the hill on the west side of the track, looking north. I could not tell that, without applying a straight edge. (Applies a straight edge and says), at the far crossing there, it would just about hit the right of way, that is a half a mile back, but at eight hundred or a thousand feet, the line of vision would stay entirely in the right of way. I mean by that, standing at a point at the foot of the hill and looking eight hundred or a thousand feet north, my line of vision would be entirely in the right of way; and looking for half a mile, it would just touch the edge of the right of way on that side. There is nothing to prevent you from seeing a train on that track a thousand feet away. Putting myself, say ten or fifteen feet from the track and looking north, then my line of vision would leave the right of way 1635 feet north of the crossing. I could not see the track that far, because on either side of the track near that crossing, there is a little cut. Yes, it would curve out of my sight. But a train would rise considerably above the cut, and you could see it.

No cross-examination.

78 BEN. F. DEWBERRY, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

My name is B. F. Dewberry. I am an engineer on the Southern Railway, and was on the 11th of October, 1904. I remember the time Mr. King, and Mrs. King and Miss Inez King were in a buggy and injured at Mag Wade's crossing, in Habersham County. I think that was about the 11th of October, 1903. The train was No. 39, and I was the engineer pulling it. I was right on schedule time. I suppose we were running between thirty and thirty-five miles an hour. Our schedule gait was thirteen minutes to run that seven miles from Alto down to Lulu. Yes, I blowed the crossing signals. There is a crossing north of Mag Wade's crossing, almost in sight of it. I could see it from Mag Wade's crossing. I did blow for that crossing and also for Mag Wade's crossing. I saw Mr. King, Mrs. King and Miss King that day before they were hurt. After I blew the regular crossing signal, I discovered a mule's head coming down the hill towards the railroad crossing, from behind a clump of bushes. By that time I was at the mile post, just about seventy-five or one hundred yards north of Mag Wade's crossing. As soon as I discovered that mule's head coming from behind that clump of bushes, I reached up and blew another road crossing whistle and all three of them turned and looked me right in the face, and I saw the old gentleman commence jerking up the mule to get across ahead of me. Of course, I jammed the brakes on as tight as I could

get them to avoid an accident. At the time they turned and looked up at me, the mule had not yet got on the crossing. Yes, they were then safe, if they had stopped. Yes, the old gentleman undertook to hurry the mule on. Just as soon as I saw he was going to try to cross ahead of me, or making an effort to cross ahead of me, as the fellow said, "I swiped the air." The air was working right, and I did everything possible to stop. I struck the rear wheels of the buggy, with the pilot of the engine. I don't know just exactly how far beyond the crossing I went, but I think the train stopped in two or three car lengths south of the crossing. I had only three cars in the train that day. Yes, I meant the rear of the train stopped that far from the crossing. There are between ninety and one hundred crossings on the Southern Railway, between the South Carolina line and Atlanta.

79 Mr. ARNOLD: I object to that question and the answer, because incompetent, immaterial and inadmissible. I think the entire case should be confined to this crossing.

Mrs. [Mr.] STRICKLAND: I expect to prove that between the South Carolina line and Atlanta there are practically one hundred road crossings, or between eighty-five and one hundred public road crossings; that the distance is one hundred and one miles; that the crossings in some localities are very close together and within a few hundred yards of each other, and at others farther apart, but on the average making about a crossing to the mile almost. We expect to show further, that to observe the statute and check and keep checking so as to have the train under control, and to stop should any person or thing be on the crossing, it would consume from five to ten minutes for each crossing, dependent, of course, on the weight and length of the train and the grade; but it would make an average of seven or eight minutes. We wish to show that this train was made up and known as No. 39, the vestibule train which runs from the City of Washington, through the States of Virginia, North Carolina, South Carolina and Georgia; that it was carrying passengers from one state to another, and also carrying an express car with freight on it from one state to another. We wish and expect to show that obedience to that Crossing Act would hinder, and practically prevent interstate business being done by the defendant railroad. We wish to show the conditions I have just stated all existed at the time this accident occurred, on the 11th of October, 1903.

By the COURT: The testimony will be excluded, and you may have an exception noted to this ruling.

Cross-examination.

By Mr. ARNOLD:

The blow post is four hundred yards from this crossing. The next crossing north of Mag Wade's crossing is, I don't know exactly, but I suppose it is seventy-five or one hundred yards north of the blow post. Yes, I suppose it is about a quarter of a mile north of this crossing. Yes, on a blow post we have two long stripes and two thin ones, which indicates two long blasts and two

80 short ones. No, sir; we are not required to blow a continuous blast from the post to the crossing. We never do that, and I did not undertake to do that there. Yes, I blew two long and two short blasts, but I hardly blew them in four or five seconds. The train would travel over fifty feet during the time I was blowing. I generally pull the whistle that way, (indicating). Yes, I could blow it in the time I moved my hand. Yes, I expect five or six seconds would cover the time. The distance I would run in that time would depend upon the speed of the train. Yes, we had a light train that day; three coaches. We usually have five or six coaches on that train. No, I did not have one of the largest engines. Yes, it had six drivers. The grade there is what we call a broken grade; a dip, and a little rise. It begins to rise about seventy-five yards from the crossing. Before we got to that rise, we were going down grade. Yes, a grade is an obstacle to speed as well as a curve. A curve that is not level will stop a car that is rolling, if it has curve enough, if the car is not moving too fast. The curve takes away the momentum of the car from a straight line, and tends to obstruct the train, as well as a grade. I think the bottom of this dip is about middle ways from the rise on each side of it. No, I don't suppose it was two hundred yards down grade. Yes, with heavy trains, engineers take advantage of a down grade. No, it is not altogether necessary to take a good start to make the hill, with a light train. Not [No], it is not the usual rule. The usual rule is to pull the train as steadily as possible. Yes, I could have made any speed I wanted to with that train going up that grade. I don't know whether that engine could run a hundred miles an hour; I never tried it. No, I never had a speedometer on that engine. I have pulled cars with speed indicators on them. Yes, I suppose I have gotten up a speed of seventy-five or eighty miles an hour several times. Yes, I suppose I had one of the swiftest locomotives in the country, at that time. I think there are other divisions on the road where as fast time is made as between Washington and Atlanta. Yes, I mean to say there are scheduled faster than on that run. The West Point road takes the same schedule. The track was 90 pounds steel rails and well ballasted. Yes, I could have made a speed of 75 miles an hour, if it was necessary. My air apparatus was in good condition. We have got what is called a "service application" and an "emergency brake." We have a little lever, called the "engineer's brake valve," which moves around a quadrant. When this is put to the extreme pressure, it is called "in emergency;" the
81 full breaking power is then put on the train. Yes, it puts the brake shoes on every wheel as hard as the air will put them. Yes, I had driver brakes. That puts the brakes on every wheel of the tank and engine, except the pony trucks in front. Yes, I put the air in emergency about 75 feet from the crossing. Pardon me just a minute; at that mile post which is between 75 and 100 yards of the crossing, I blowed that second road crossing signal for these people. Of course, I was running all the time I was doing that, and when I turned my whistle loose, is when I jammed on the air. I blowed for that crossing and when I jammed on the air in emergency. Yes, that would only take a second of time. I suppose I was thirty or

forty yards from the crossing, when I had finished blowing the whistle, and putting the air in emergency; I may have been fifty yards. The rear end of the train stopped two or three car lengths beyond the crossing. The engine was between 50 and 60 feet. The engine is about the same length as a coach; I think they are 55 feet. Yes, I ran about 355 feet beyond the crossing before I stopped. The space in which I can usually stop a train of that sort, depends upon the grade, the weight of the train, etc.; but I stopped that train as quick as I could possibly, to save my life. Yes, that was an illustration of how quick I could stop a train there, running thirty miles an hour. I saw the mule's nose coming from behind a clump of bushes. The mule's head was all that come from behind the bushes, and out in the clear. I did not see the people until I had blown that second road crossing, and by that time they had gotten out in the clear. I could not see the crossing proper right there until after I had passed that mile post, on account of the curve. There is a very shallow cut there on one side of the road. There was a little clump of bushes on the right hand side of the crossing as I was coming south, at the edge of the right of way. That shut off my view of the people until they come out from behind them. Yes, I was at that mile post, about 75 yards from the crossing, before I could get a view of the crossing. I suppose the mule's head was fifty or sixty feet from the first rail, when I first saw it. I don't know the length of an ordinary mule. I never measured one. I don't know the length of a buggy. The width of the railroad track is four feet eight and one-half inches, I think. I caught the buggy between the front and the hind wheels, yes. The old man had gotten the mule across, and the front wheels of the buggy across, and the rear wheels were getting over when the pilot or pilot beam, one or the other, hit him. Of course, the
82 bottom of the pilot raised the buggy up, and the beam hit the wheel and turned his buggy over. Yes, if he had gone two feet further I expect he would have gotten clear. Yes, I say when the old man saw me, he began urging his mule up. I don't remember whether the mule got into a trot or not. When he looked up I was not in the act of blowing the whistle, I was trying to stop then. No, I was not in the act of blowing the whistle when I saw the mule's head. I had already done the blowing 400 yards back. No, I did not blow the whistle from that point until I got where I saw the mule's head. I blowed four blasts. It was not a cattle alarm, but a crossing alarm; I blowed the second road crossing whistle. By the time I had reached the crossing, I had slacked up some. Yes, I run 350 feet beyond the crossing. I held on the emergency brake until I got it stopped. That kept the full braking power on until it stopped. That brake don't lock the wheels, but if the track was slick it might lock them. On a track like that was, the pressure was that just short of locking the wheels.

Redirect examination.

By Mr. STRICKLAND:

When I blowed that second road crossing signal I expected them to stop; when I attracted their attention, I expected them to stop. No, he was not then in danger.

W. M. GAINES, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

On the 11th of October, 1903, I was road foreman of engineer-, or traveling engineer on the Southern Railroad. I still hold that position. It is my duty to ride on the engines on the division; to keep in touch with their general condition, and make reports of the same. The engineers and fireman are in my charge while on the line. I remember the occasion when the Kings were stricken on the 11th of October, 1903, at a crossing in Habersham County. I was on the train that struck them. I was in one of the cars, but don't remember which particular one. I was in the smoking department of a car, and I believe it was in a first-class coach.

83 Yes, the engineer blew his whistle for this crossing when the accident happened. In half a second after he blew the regular crossing signal I noticed that he blew another signal just about the same as a road crossing signal, only it is of shorter duration; in other words, he blew it like he was in a hurry; and almost at the same time I felt the brakes come down in emergency, and then I knew something was wrong. Oh, yes, in the car I was in, I could tell what brakes went on. It commenced to check the train. It checks it pretty rapidly when the brakes are put in emergency. The train came to a stop beyond the crossing, I suppose about a hundred yards. I should think the rear end of the train was near a hundred yards of the crossing; I did not notice it very particularly. I did not see any part of the accident. Yes, I have looked to see, and a train can be seen for two or three hundred yards from the crossing, standing at a point near the track, and coming from the direction Mr. King was coming. I have simply looked at it, but did not measure the distance at which it could be seen.

Mr. STRICKLAND: I now wish to tender the same evidence from this witness as I offered from Mr. Dewberry as to the number of crossings between South Carolina and Atlanta, and the time it would consume to comply with the crossing act.

Mr. ARNOLD: We object to it.

By the COURT: The testimony is excluded. Let an exception be noted.

Cross-examination.

By Mr. ARNOLD:

I went back to see the people hurt. Yes, I think, approaching that crossing, I could look up and see two hundred yards. I think a man coming down that dirt road like Mr. King was, if he had looked could have seen a train approaching that far off. There is something that would shut his view off farther than 200 yards. There is a little clump of bushes there on the embankment that would be between him and the railroad; but after he came from behind that, there would be an unobstructed view. There is a rise in the road, and probably the train would be out of

sight at that distance. I say he might see the train 200 yards or 300 yards after he came from behind the bushes. After you
84 leave that point you wind around a hill, and then I don't suppose you could see it for quite a distance. But after you get from behind that clump of bushes, then you could see the train for 200 yards. No, you could not see it when you got there, unless it was within the range of your vision. A man coming from behind those bushes would be about 50 or 60 feet from the track. The right of way is 50 feet, is my recollection, and I think it is a little further back; about 60 feet I do not think there is anything to hinder a man from seeing a train on that curve. I do not think there is a reverse curve there.

(Picture No. 6 handed witness.)

A man standing on the crossing I think could look across this curve and see a train up here. No, I never tested it to see how far he could see it. I should think the engineer was running about thirty miles an hour. We were right on time I remember. I remember when we left Alto. I remember the first crossing south of Alto. He blew for that crossing; blew for all of them. No, I was not specially noticing whether he blew for the crossings on that trip, but I remember it occurred to me that he was blowing extra long signals. No, sir; it is not a fact that I could ride a hundred miles and not notice him blowing once. In the railroad phrase, he was "feeling good." Just before reaching the crossing, he blew two short blasts,—there is four; that is my recollection. The same signal as for a road crossing, only of shorter duration. The blasts were short, and that attracted my attention. There was not a soul in the smoking compartment with me. Yes, I noticed the blowing. He blew for the other crossing north of there. My recollection is it is about a half a mile north of this crossing. I think he blew for all of the crossings. I would not swear that he blew for all of them, but it is a part of my business to see that the men, especially the engineers, carry out the rules, and the fact is I spoke to Mr. Dewberry about blowing so long. I knew there was something wrong when I heard the alarm. It was a very short time after that that he put the brake in emergency. I could not say how far he was from the crossing when he blew, because I was inside the train. I think he would be about 200 yards of the crossing when he blew for it, but that is mere guess work. I suppose he could stop that train running thirty miles an hour in one hundred and fifty or two hundred yards. If he was running sixty miles an hour, it would take him at least three hundred yards to stop, I think. No, I don't know that he began to check at all, until he gave that alarm.

85 M. J. THORNTON, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

On the 11th of October, 1903, I was employed by the Southern Railway as locomotive fireman. On the day Mr. King got hurt I was firing for Mr. Ben Dewberry. I was on the

engine with him. Yes, Mr. Dewberry blew the crossing signal before reaching Mag Wade's crossing. He also blew for another road crossing between that post and the crossing. Yes, I saw the Kings before they were struck, or just about that time. It is very hard to tell which was first; whether I saw them before they were struck, or just at the time they were struck. I was on the left side of the engine. I was looking out of the engine. When I first saw them, they were on the crossing. The hind wheels and rear portion of the buggy was struck back of the seat. I don't think any part of the train struck either of the occupants of the buggy; I cannot say positively about that. When the engine struck the buggy, it knocked Mr. King under the whistle post, or the crossing post, and those rock- that surround it. Yes, there were rocks around the base of it, and it seems that Mrs. King and her daughter intended to jump about the time they were struck, and it knocked them up in the air. Mr. King was not knocked up at all. I saw Mr. Dewberry when he put on the emergency. At that time I had not seen the buggy. I did not then know what it meant. When he put on the emergency the train began checking. It ran beyond the crossing and then stopped. It ran about 150 yards beyond the crossing.

Cross-examination.

By Mr. ARNOLD:

I do not know how high in the air this little girl was knocked, but one of them seemed to be knocked a good piece in the air. I hardly think it was as much as twenty feet. I think at the coroner's inquest I stated that she was knocked about as high as the engine cab. I don't think I said then that she was knocked up to the smokestack, but that it looked to me as though she was knocked about as high as the top of the engine cab. She hit the ground. I don't know whether she hit any obstruction, or the buggy. I don't know whether she hit anything but the bare ground. When the engineer blew the alarm whistle, I think we were something like forty or fifty yards from the crossing. I had not seen the people then. It was not very long after that when I did see them. I
86 don't know whether I looked out on Mr. Dewberry's side or not. When the mule appeared on the crossing, I think we were at least twenty or twenty-five yards of it, when I saw it. The mule was partly across the crossing when I first saw it. I don't know that I first saw the nose of the mule come in sight. I saw the mule and the people at about the same time. I don't know how fast the mule was going. I think the mule was going in a lope. I did not see the old gentleman hitting the mule. I think we were running thirty or thirty-five miles an hour when Mr. Dewberry blew for them. I don't remember what I said about that before. I *saw* now it was running 35 or 30 miles an hour. I don't deny that I said forty miles an hour at the other trial, for I don't remember what I did state about *about* that. I think he could have stopped that train in 150 or 160 yards. I don't believe I said 140 or 150 yards at the other trial, but I say now it could be stopped in 140 or 150 yards; something like that. Yes, he put the air in emergency. The mule

had got across, and the hind wheels and the back end of the buggy was caught by the train. I think three feet would have cleared the buggy all right. I knew Mr. Dewberry blew back there at the signal board. Yes, I do say I know he did. I don't remember about him blowing for the crossing just above that one; nor the one back of that yet. When he blew for Mag Wade's crossing, I don't know whether we were in sight of that crossing then or not. No, I did not know there was anybody on that crossing, nor that any one was going to be hit there. His blowing right quick did not attract my attention in the least; it was his putting the air in emergency. I did not know what he was blowing for within forty *forty* or fifty yards of that crossing, but thought he was blowing the crossing signal. Well, he had already blown the crossing signal a piece back there. He blows two or three crossing signals when it is necessary. He put the air in emergency immediately after that blowing. I then looked, but I did not see anything for almost a second, looks like, and the first thing I saw was the mule's body, I think. Riding on the left hand side of the engine, I cannot see what is on the right hand side of the engine. I can see what is on the left of the engine.

87 F. BAXTER, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

On the 11th of October, 1903, I was a passenger conductor on the Southern Railway, and as such was in charge of the train which struck Mr. King. We were on time. The schedule for that train is something like thirty miles an hour, or thirty-five miles an hour. At the time of the accident we were running about thirty miles an hour. Yes, the engineer blew the crossing signal for Mag Wade's crossing. As well as I can recollect, I was in the rear car when we reached that crossing. We had three cars that day—engine and three cars. The engineer blew four short blasts of the whistle just before the brakes were put on, and the brakes went on in emergency. After he blowed the first road crossing, right after that he blew four short blasts. For the road crossing it is two long and two short blasts. Right after that he blew four short blasts close together. The brakes then went on almost immediately. The brake shoes reduced the speed of the train at once, and we stopped pretty shortly after we passed over the crossing. I did not see anything of the accident myself.

Cross-examination.

By Mr. ARNOLD:

I am just an extra passenger conductor. I am a regular freight conductor. The next road crossing above Mag Wade's crossing is, I suppose, five or six hundred yards. Yes, he blew for that crossing. The next road crossing is about the same distance above the next one. Yes, he blew for that crossing too. There is not very much difference in the distance between crossings there. There are a whole lot of crossing- along there. Yes, he

blew for all of them. Yes, I remember him blowing for each of them. I could not tell you how many crossings there are between Atlanta and the South Carolina line. I remember he was blowing for those five crossings there, from the simple fact I was doing nothing and he was blowing the whistle all along there. I was attending to my own business. No, it is not a fact that the first whistle I noticed was the four short blasts. He blowed the road crossing whistle there at the blow post, I suppose. I believe that it is about four hundred yards from the crossings. Yes, sometimes I do pay attention to engineers blowing for road crossings. I could not tell you how many trips I make a year over that line. I sup-
88 pose I make a hundred trips, and probably more than that. Yes, I could tell you where he blows every time. At the road crossing above this there was nothing to attract my attention. I did not know an accident was going to happen. No, sir; the engineer and myself have not been comparing notes as to the speed we were going. I put it as my opinion that we were going thirty miles an hour, simply because our schedule was thirty miles an hour, and we were right on time. Our schedule between Alto and Bellton is thirteen minutes to go that seven miles. No, we do not stop at Alto. We did stop at Bellton, and got a doctor there. Yes, we lose a good deal of time in stopping and starting at stations. No, we did not have any speedometer on that train. I was sitting down in the coach when he blew for these people. No, I did not look out of the window. I suppose the rear end of the train was seventy-five or one hundred yards beyond the crossing when it stopped. I could not tell you how far he was from the crossing when he blew those four blasts. He must have been close to it; must have been within fifty yards of it, I think. I felt the brakes go on in emergency. I could not tell you in what distance a train can be stopped, running thirty miles an hour. I should think, though, in something like 150 or 200 yards.

Redirect examination:

Yes, I said our schedule from Alto to Bellton was thirteen minutes and the distance seven miles.

By Mr. ARNOLD:

I don't deny testifying in the trial of a case involving this same transaction, that if a train is running thirty miles an hour, and the brakes go on immediately, and the engine reversed, it will run seventy-five or one hundred yards before it stops. I don't remember what I testified there.

J. C. BEARDAN a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

On the 11th of October, 1903, the day on which Mr. King's buggy was struck at Mag Wade's crossing, I was baggageman on that train. The engineer blew his whistle for that

crossing. After that he blew a short, quick road crossing
89 whistle. Four blasts. Right after that I felt the brakes go on in emergency, the effect of which was to check the speed of the train. I did not see any part of the accident and don't know anything about it.

Cross-examination.

By Mr. ARNOLD:

Up to the time I felt the brakes go on, the engineer had not begun to check for that crossing. I don't know how far the next crossing is above that one. I don't remember whether he blowed for that next crossing or not. I guess I noticed him blowing for the crossings, but I don't remember it now. Yes, if he blows an alarm for somebody, that will attract my attention. I would naturally notice that. No, I did not know that any accident was going to happen when he blowed at the blow post four hundred yards away. My attention was not called to any accident or trouble until he blowed those four short blasts. I could not say how far he ran after he blowed those four blasts, but I suppose between 150 and 200 yards. He was running between thirty-five and thirty miles an hour before he put the brakes on. At that time I was not doing nothing, just sitting on a trunk in the baggage car.

MELVIN WILSON, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

On the day Mr. King was hurt on the Southern Railway I was just about one hundred yards right down the track from the crossing. The train was coming south towards Atlanta, and King was going from west to east across the track. I was going home from meeting. I had been to church. My daughter was with me. We were traveling on foot, walking on the railroad. I heard the engine blow for that crossing, and just stepped off. I was walking at the end of the ties, me and my daughter. We had gotten about as far as from here to the back end of the room here below the crossing, when I first heard the train. This room is something like forty or fifty feet. I first heard the blowing of the train; I mean, heard the whistle. It was a long blow, just like I hear them blow a number of times up there. When I heard the train blow, I just spoke to my daughter and said we had better
traveled the dirt road, and she says "no, we can get off the
90 fill," and it blowed three or four different spells. I heard it blow, and says, "it's coming, let's hurry and get off this fill." By "blowing two or three different spells" I meant blowing for crossings, I suppose it was. Yes, I heard it blow for Mag Wade's crossing. I know it blowed two crossing signals before it got to Mag Wade's crossing. Yes, I heard a noise of the running of the train, independently of the whistle. When I heard that, the train must have been away up towards Alto, two miles and a half from there.

Yes, before it came in sight I heard it. After it blowed for Mag Wade's crossing I just stepped across to my daughter, who was on the other side from me, and I says, "yonder it is," and stepped out of the way, and turned around and looked at it. Yes, when I turned around and looked at the train, I then saw the Kings. They were then coming around that curve towards the track, on the dirt road, in a trot, all of them. Some one was ahead of them. Taylor Dodd and his wife, I suppose it to be his wife, was in a two-horse buggy in front and Mr. King's son-in-law and his wife, and Mr. Yarbrough and his wife was still in front, and Mr. King was in the rear. When I first saw Mr. King he was just making that curve around that bunch of bushes. Well that is something like sixty or seventy feet from the railroad track, I reckon. I reckon it is worse than that. I reckon it is one hundred feet, or close to it, where they were. They were just turning down that slant. I saw them from that time on, until they made the crossing. No, they did not stop. They were driving in a trot, and remained trotting until they got down the slant, and until they got on the railroad crossing, when the mule began to walk over. Yes, there was a little rise there, like at all crossings. The track is built up there a little above the level of the ground. It is built up of gravel I think. I don't know how far from the track it went. I never have measured it. I cannot tell you whether they saw the train or not. It didn't seem to me just looking at them. The crowd did not seem to me to be looking for a train. Yes, the engine blew an extra signal. It was getting in a short distance it looked like to me, and it blowed two short blasts I know. I don't think they had time to do anything at all, but they tumbled out of there. I did not see them doing anything more than it looked to me the old man tried to slap the mule with the lines. After they came within my sight, and before going on the track, I never noticed them turning any head. If they had turned their heads before going on the track, I suppose they could have seen the train coming. It was in view then. Yes, they drove on the track.

91 Cross-examination:

By Mr. ARNOLD:

The old man did not notice the train that I saw. No, I did not see him turn his head and look at the engineer. I was looking for the train to come up. No, sir; I didn't know that he was looking at the engineer, and had his mule at a gallop going across that track. I say they were trotting until he started up that little rise to the track and quit trotting to walk over. Yes, when I first saw the old man and the train, the old man was 60 or 70, or may be 100 feet away from the crossing. Yes, I saw the train at that time. I don't know how far the train was from the crossing then, but it must have been something—the train come in sight of me about the mile post, and I don't know how far that is from the crossing. I think it must have been 75 or 100 yards from the crossing. I have not measured the distance the old man was from the track when the mule began to walk. It is just a gradual fill over the railroad cross-

ing, but I am not a railroad man. If the mule was one hundred feet from the crossing when I first saw it, the mule trotted more than half that distance before he began to walk.

(To the COURT:) Yes, it is just one of those little raised places to get over the track, and it is ten, twelve, or may be fifteen feet. I never measured the distance.

(Mr. Arnold hands witness picture No. 5.)

I don't know that that is a picture of it. Yes, that is the dirt road. The rise would commence about here. Coming towards the railroad track, the picture shows the rise wrong. Mr. Gaines, I think, first discovered me as a witness; he took my name. I cannot tell you who subpœnaed me in this case. Mr. Falkner here did not subpœna me this time. He has talked to me about this case a time or two. He subpœnaed me once or twice and Mr. Gaston has. Mr. Gaston told me he wanted me as a witness and to tell the truth, and that's what I want to do. I have not been sworn three times about this case, but about this transaction I have. I don't know what they pay me a day for attending Court. They have paid my expenses. I think they will pay me two dollars a day. I don't know that I can tell you how many days I have attended Court in these cases. When the engine blew I was right in the neighborhood of one hundred
92 yards below the crossing. Yes, this is the crossing. Yes, it is a continuous curve to the left, a little bit. That crook is a little further up, I think. It has not as quick a crook as that shows on here. That is too sharp a crook right there. Yes, I was about a hundred yards below the crossing when it blew. Yes, it is a gradual curve to the left all the way, but it is not a sharp curve like that. No, sir; the train did not like to have caught us before we could get off the track. No, sir; I did not go back there and tell Taylor Dodd that me and my daughter had to scramble off to one side of her for I stood where I could put my hand on her. No, sir; she did not go off on one side, and me on the other, and the train did not nearly catch me. No, sir; I did not tell W. D. Dodd up there at the crossing that the train like to have caught me, and that I never saw a train going so fast. I did not tell Frank Yarbrugh the same thing. When I first saw the train, it was coming about that mile post I I spoke of a while ago. Yes, I know the difference between a mile post and a blow post. I think the mile post is 75 or 100 yards from the crossing. I was looking for the train. I stepped off to one side, and was looking for the train, and as quick as it come in sight I saw it. I don't know how far it had gone from the mile post when it blowed. It might have been closer to the crossing than I could tell. When he got near the buggy he blowed two blasts, is all I noticed. No, he didn't blow four blasts when he got to the mile post; two is all I noticed. Yes, sir; it seemed to me but a second or two then before he hit them. Yes, he did blow about that blow post, but I could not see the blow post from where I was standing. If he blowed between that time and the time he blowed those two blasts, I did not pay any attention to it; but I did hear the two short blasts. I suppose all the time the engine was coming from that mile post to that crossing the engineer had a view of those people in that fifty

or sixty feet to the track. I was not expecting anything; no, sir. No, I did not expect anything to happen until I turned around. Yes, I looked around and saw this old gentleman coming down the hill 60 or 100 feet away from the track. I saw the old man and the train about the same time. Yes, after I looked around I expected something was going to happen. Why, yes, all the time the old man was going that 60 or 100 feet the train was coming towards him. Yes, I think the engineer could have seen the old man after he got from behind those bushes, and the old man could have seen the train. No, sir; the old man seemed to pay no attention. I expected the
93 old man would have been safe if he had gotten two feet further across the track. It just caught the hind wheels of the buggy. I could not tell you how fast that train went over the crossing. I am not an engineer or railroad man, and never studied anything about the capacity of a train. I don't know that it did check up until it hit the buggy. It had but a short distance to go, and it did not stop like I could stop a horse and buggy. I know there is a difference in the blowing for a station and a public crossing. Way up there it blowed two or three or four blasts; it was kind of "Toot, toot, toot," along there. I cannot tell you where it blew last before that; but still up the track. Then it blew just like I told you. I heard it and got off the track just as quick as I could step over to my daughter. I did not go over exactly when the train come in sight, but very shortly after.

Redirect examination.

By Mr. STRICKLAND:

After the train stopped I got on the train and went after the doctor. Yes, I walked back to where Mr. King was hurt. I then got on the train and went after Dr. Hathcock, Mr. Gaines *taken* [taking] my name right then and there. Yes, sir; on the former trial of this case the same questions were asked me as to whether I had not made those statements to Taylor Dodd, Will Dodd and Yarbrough.

Q. I will ask you whether or not they produced those witnesses to testify on that subject?

Mr. ARNOLD: We object to that.
By the COURT: Sustained.
(Picture No. 5 shown witness.)

I see a house, I reckon, then I see up there near the right of way. That is old man Wade's house, I suppose; Charley Wade. The whistle post stands right in front of his door. That is the whistle post for Mag Wade's crossing. Yes, that is Charley Wade's house I see in the picture.

94 Miss SARAH WILSON, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

My name is Sarah Wilson, and I am a daughter of Melvin Wilson. On the 11th of October, 1903, when Mr. King was

hurt on the Southern Railway I was down on the railroad track. I was on the railroad, yes. I was south of the crossing, towards Atlanta. Yes, I stopped on the track. I think I was about a hundred yards from the crossing. Yes, I heard the train that day before it got to the crossing. I first heard it blowing. I heard it blow three or four times. It blowed some time apart. Yes, I have heard them blow for crossings. Yes, that train blowed for that crossing. Four blasts, I believe. Yes, I also heard the sound of the running train. I don't know how far it was away from the crossing when I heard the sound made by it running. No, I did hear it running before I heard it blow for Mag Wade's crossing. After I heard the train and knew it was coming, I just walked off the railroad to the side of it. My father was with me. Then I just turned around and looked back towards the train. I remained turned around until the train got to the crossing. I saw Mr. King and his family. They were near the crossing when I first saw them. They were in a buggy, driving a mule, and traveling tolerable fast. By "tolerable fast" I mean in a trot. Yes, they looked at the train when they were near the crossing. All three of them turned their heads that way. At the time they did, that the train was in sight, and they could have seen it. Yes, they had time after that, and could have stopped before the train got to them. Yes, if they had stopped they would have been safe. When they looked at the train Mr. King drawed the lines back and slapped the mule. The train then struck the buggy. When I first caught [sight] of Mr. King and family in the buggy, they were something like fifteen feet, I reckon, from the railroad track. I mean the people were about fifteen feet of the track, and the mule was between them and the track.

Cross-examination.

By Mr. ARNOLD:

Yes, I said the people were fifteen feet from the track when the train came in sight. Between those people was the distance from them to the shafts, and the length of the mule ahead of them. No, I don't know how far that would be. I
95 don't know the length of the mule or the buggy. I don't know how far the train was away at that time. At that time I got a view of the train. I cannot tell you how far the train was from the crossing then. Yes, I have noticed the mile post about 75 yards up the track. I think the train was about the mile post when it came in sight. Yes, it was running very fast. The engineer blowed twice while the train was in sight of me. He blowed up at the mile post, and then just as he hit the people. He blowed one blast at the mile post. He blowed twice as he hit them. Yes, I have testified before in this case. I don't think I testified at Clarkesville that the only blowing he did was just as he hit the buggy. I think I did say on that trial that the "front of the mule was nearly up on the track just as the train blew." "The train blowed and he was knocked instantly off the track, blowed two short blasts." That was my honest belief when I testified it. I don't take it back, no. No, I did not notice the old gentleman and lady and girl until they got

about fifteen feet from the track. I did not notice them as they circled around the hill. The buggy was not far from the track when I first saw them. Fifteen feet is not the distance from me to you. I would say fifteen feet is about as far from me to Mr. Faulkner. The mule was going in a trot. The mule was traveling fast until the time he got on the track. About the time he got on the track he begun to walk. Yes, I say the mule trotted until about the time he got on the track and then it began to go slower, and went slow until the train hit him. Yes, I went right back up there. No, sir; I did not tell Taylor Dodd or Will Dodd that my father and I came near being knocked off the track by the train, or that we just did have time to get out of the way. The train stopped about even with us, I think; the rear car. I guessed at the distance of one hundred yards south of the crossing, myself. Yes, I have told my father I thought it was about 100 yards. I have been paid two dollars a day for attending Court.

Redirect examination.

By Mr. STRICKLAND:

I say I think the train blowing is what made these people look around. I testified before on the other trial that the engine blew four times. It blowed two times then and these people looked. I say it blowed again after it blowed four times.

96 R. F. QUILLIAN, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I live at Bellton, Georgia, and have lived there thirty-three years. I know the Mag Wade crossing in Habersham County; it is three and a half or four miles south from Bellton. I have been familiar with that place all the time for thirty-two or three years. This picture No. 2 is a pretty fair representation of the situation at that crossing. I was up there at the crossing a short time after Mr. King was hurt there. I suppose about a month afterward. My nephew, I believe, asked me to carry him up there. He was going up there to meet some parties to take some measurements. It was probably later than that; it was when they were preparing for the other trial. I remember that Mr. King was hurt there. I pass there very often. There were present with me Mr. Hughes, Mr. Faulkner, my nephew, Ed Quillian, and the photographer; and there were a good many other gentlemen happened in there; just come in there; Mr. Wade, two or three of them. Yes, Mr. Patton was there. Yes, we took some views to see whether or not a man standing on the dirt road near the railroad track, and west of it, could see the track itself looking north, but it is a right smart distance, 200 yards or more. Standing in the same place I think you could see a train a half mile, off and on. I believe you could see it the whole way up to Charley Wade's house. That must be half a mile. But you understand the engine is up fifteen or twenty feet higher than the track. Standing at the point

designated, fifteen or twenty feet on the west side of the track, and looking up towards Charley Wade's house, my recollection is there was nothing to cut off the view of an approaching train; the view might be cut off for a part of the way. If you had been a little closer to the railroad you could not have; but if you were 15 or 20 feet out there, I don't think there was anything to obstruct the view. We made a test by standing in the middle of the crossing and looking north, we could see a man 180 yards off. If he was put 20 feet from the crossing, I don't know how far you could see him. Yes, I saw this picture made. I don't remember just where the photographer stood when he took this view. This object here is a mile post. My recollection is the white spot at the end of your pencil is Ed. Quillian and Mr. Patton in
97 a buggy. The buggy was some fifteen or twenty feet from the track, on the west side; on the side from which Mr. King came, and the idea was to see if a man in coming along with a buggy there could have seen a train up here anywhere. I don't remember how far we could see him, but it was a long ways. We measured it, and some of them probably does remember it. I see a house located here in this picture No. 5. That is Mr. Charley Wade's house. His house must be a half a mile from the crossing.

Cross-examination.

By Mr. ARNOLD:

Yes, I went up there with my nephew, Ed Quillian. Yes, he is a lawyer for the Southern Railway. I don't know whether this is a blow post opposite Mr. Wade's house or not. There is a blow post about opposite his house. I think there is a road crossing at his house. I don't see any other blow post between here and there. Yes, it is a fact that the track winds around like a black snake in there; reverse curves. Standing in the middle of the track, there are times when the train would be in view, and at other times not. I have stood there before and since, and seen trains pass, and my recollection is, if you stand fifteen or twenty feet from the track, I think you can see a train to Charley Wade's house, and may be further. Yes, that depends upon whether you stop and wait; if you keep on moving the train would get out of view. I don't know anything about this accident of my own knowledge. I don't know anything about the conditions as to shrubbery, trees and so on, that prevailed at the time of this killing, for I have never examined it. I had passed there before, but never took any special notice except to stay out of the way of trains, and I could see. I don't know what timber has been cut off.

Redirect examination.

By Mr. STRICKLAND:

Yes, in coming around that hill before going down to the crossing, there is a place where you can see the track up the road. I think that space is probably 150 feet, or maybe a little more, or it might be a little less. That being about sixty feet from

the crossing. From that point to the crossing, I don't think there is any point at which you cannot see a train approaching; you can see farther at some places than at others. What prevents
98 one from seeing as far at one place than another, is on account of the curvature of the road, and the bank on one side and the timber. I don't think there would be much to hinder you from seeing a train at a good distance up the road. The train is higher than the bank is on that side, and you could see it over the bank.

T. M. PATTON, a witness called and sworn on behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

Yes, I went to Mag Wade's crossing at the time some measurements were being made there a year or two ago. I live about four miles from that crossing, and I have known the crossing for fifteen years, I expect. Coming from the west on the dirt road towards the crossing, you can see the railroad track up there from the crossing a piece. Sixty-two feet from the crossing, on the west side, seated in a buggy, you can see a train half a mile, I guess. Between that 62 feet and the crossing there is no place where you cannot see it. You can see a train at any point between that 62 feet and the track, and see it between a quarter and a half a mile off. You can see it above Charley Wade's house. I was sitting in a buggy 62 feet off from the track, and I saw a train coming. That 62 feet ends right close to the foot of that little hill, and is close to that bank there. The head of the horse hitched to the buggy was turned towards the track; and the rear wheels of the buggy was up the hill a little. Yes, I saw a train from that point. When I first saw the train it was near a half a mile; it was up to the next curve; next cut above that. I guess that it [is] near half a mile. I saw the train all the way from there until it got to the crossing. There was no time when it passed out of my view, until it reached the crossing. Oh, yes, I could hear the train running, and heard it before it come in sight.

No cross-examination.

T. B. SIMMONS, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I have passed Mag Wade's crossing in Habersham County several times. Yes, I have looked, and a fellow can
99 see a train coming from the north down there. A person standing in the dirt road, on the west side of the railroad track, ten, fifteen or maybe twenty steps from the track, and looking north, can see the track from there; and he could see a train approaching; it looked to me like three hundred yards up the road. From that distance from the track I do not know of anything that would prevent him seeing. I do not know of any place from the foot of the hill, coming in the direction Mr. King was coming to

the railroad track, that a person could not see a train approaching. There is no such place there. Yes, I have seen Mr. King in his life, and have known him a right smart while. I did not know his age. I could not tell what his physical condition was a year or so before his death. He looked like an old man, and I don't reckon he was as stout as a young man.

No cross-examination.

W. S. MILLER, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I know this place called Mag Wade's crossing in Habersham County, where Mr. King was hurt in October, 1903. I will say a man standing thirty feet from the track, on the west side of the railroad, could see the railroad track. From that point he could see the railroad track 900 feet, or something very near that. I could not tell you how far he could see a railroad train from that point, but a right smart little step up the road. He could see a train farther than he could see the track. From a point thirty feet from the crossing, on the west side of the track, there is no place where he could not see a train approaching; you could see the top of the engine all the way around that little curve, and coming around that little bank. Yes, I mean the curve in the dirt road the way Mr. King was coming. There is a bank there, but he could see the top of the engine over the bank, barely can see it. After you get to the foot of the hill, and within thirty feet of the track, then there is no place along there but what you can see an approaching train. I have known Mr. King all my life. I don't know how stout he was, but he said he was not able to make a living by hard work. That was in the summer before he got killed in the fall. He did not tell me what was the trouble, and I never asked him. I don't know of any trouble he had. I know Miss Inez when I see her. I saw her about two weeks after she was hurt. She was then at home. When I saw her she was sitting on a bench on the porch with a little child in her lap, and she got up and walked into the house. The child looked like a little small fellow. When she got up, she took the child and went on into the house. Yes, that was two weeks after she was hurt, as near as I can guess about the time.

Cross-examination.

By Mr. ARNOLD:

Yes, I testified in this case before. I testified that I lived about a hundred yards from the Southern Railway, and about seven or eight hundred yards from this crossing where King was killed. Yes, I said I was home the day King was killed. Yes, I said "I heard the distress signal, but not the crossing signal; the distress signal was the first thing that attracted my attention." And I swear the same thing now. Yes, I was simply talking with old man King in casual conversation. I saw him working along occasionally, like

a man of his age, usually. I don't remember that I ever heard him say what his age was. Yes, he looked to be 60 or 61 years of age, or older. I saw him driving mules, and saw him plowing some little, but very little. Yes, he had two plantations, or little farms, he looked after. When I saw this plaintiff with the child in her lap, sitting on the porch, was near two weeks after the accident. I live, I expect it is near a half a mile from Mr. King's place. No, I have not been there frequently since; just a few times. I have not seen her doing anything since, except sitting in a chair, and I saw her lying in bed at one time.

SAM DAVIDSON, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I remember the occasion when Mr. King was killed at Mag Wade's crossing. I was at Calvin Wade's house that day. His house was off sort of east of the crossing, or southeast, and I think about 400 yards from the railroad. I could hardly tell how far from the crossing it is, I never did look at it much. It was north from the crossing. When the train passed I was stand-
101 ing by Wade's window, to see if I could see it. I heard the train blow by Mr. Gully's. It blowed one long blow. I could not see it from where I was. I was expecting to see it, but didn't and it blowed two blows, as well as I remember, right there at Mr. Wade's, and went on down where it knocked Mr. King off, and blowed two short blasts. Yes, I heard it blow at Wade's and above Wade's, and two short blasts at that crossing. Standing in the centre of the track at this crossing you could see up the track north, something like two or three hundred feet; you could see the track. Suppose you get off fifteen or twenty feet from the track on the west side, coming the way Mr. King was coming, and you could see a train a good piece; a quarter of a mile up that way, and probably further. Let a fellow standing at that point cast his eyes up that way, he could see a train all the way for a quarter of a mile, or may be further.

Cross-examination.

By Mr. ARNOLD:

I was standing at the window and wanted to see the train pass, if I could. Yes, the house was a quarter of a mile away. I guess you could *not* see it if *it* had got on top of the chimney of the house, but I was expecting I could see it at some little point through there. I had been at that house once before. No, I did not know I could not see the train, but, as a matter of fact, I did not. I was not running with Gaston and Falkner, looking up testimony; I went on my own accord. The railroad has not promised to pay me anything. They have paid me for my time in these other cases, two dollars a day. Certainly, they pay me my expenses.

By Mr. STRICKLAND:

I was just going to Mr. Beattie's. That was last Friday or Saturday of last week. I was just going around with him, talking and having fun, and he was subpœn-ing railroad witnesses. I suppose he knew where they lived.

HAM DODD, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I remember the occasion when Mr. King was killed at Mag Wade's crossing, in 1903. I was at Mag Wade's that day. His house is on yonder side of the railroad from this
102 crossing. It is north of the crossing. It is on the west side of the railroad. I was about 140 yards, I reckon, or something like that, from the railroad, and while I never stepped it, I was about 250 or 300 yards from the crossing. I saw that train pass, and I heard it. The first I heard of it was its blowing, right somewhere about old man Charley Wade's house. One blow is all I paid attention to; one long blow. One time is all I heard it blow. I was standing out on the veranda with my wife and Mack's folks. There was something happened that impressed the matter upon my memory about the train blowing. It scared my baby. My wife had the baby in her arms, and I told her to go gack into the house to keep from scaring the baby. At that time I lived two miles and a half below yonder. I have never examined Mag Wade's crossing to see if a man could see an approaching train if he was near that crossing; never paid any attention to it.

No cross-examination.

MACK WADE, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

On the day Mr. King was hurt at the crossing, I was at home when the train passed. Ham Dodd and some of my folks were there; Ham Dodd and I were together. Yes, Ham Dodd's wife and child were there. My house is north of the crossing and is on the west side of the railroad. It is something like a quarter of a mile to the crossing, or hardly so far. Where the railroad track passes my house, it is something like 135 or 140 yards. Yes, I heard that train before it passed my house. I heard it blow as it passed the house, and heard the racket of it. I paid attention to the blow first. It first blowed right passing my house, and my father's (Charles M. Wade's) house, but I was not paying any attention. His house is between me and the railroad, but it is a little further north. There is a blow post standing right in front of pa's house. It was Ham Dodd's baby first attracted my attention to the blowing of the train. His baby just got scared as the train passed. Every time a train passes it scares it, and it just kept crying and screaming, and it was blowing as it passed, and I turned and asked what's the matter with

the baby? And Ham said every time a train passes it scares
103 it. That is how I came to notice it blowing. I have been at that Mag Wade crossing. A man standing in the dirt road, on the west side of the railroad, within, say, twenty feet of the track, and looking in a north direction, he could see a train coming something like betwixt a quarter and a half a mile; something along there. Yes, I have stood at that point and seen them passing. Standing at that point 20 feet from the track a train coming south would first get out of sight something like a half a mile up there. I have never measured the distance, but it is something like half a mile. It is beyond my father's house. You can see a train all the way until it gets to the crossing.

Cross-examination.

By Mr. ARNOLD:

I never paid any attention to how many blasts of the whistle I heard. I don't know how many it blew. Yes, my house faces the railroad. I am about a quarter of a mile from this crossing. I know I heard the whistle, and that's all I know.

W. M. GAILEY, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

On the day No. 39 hurt the Kings I heard it pass. I was standing in my yard when it passed. My house is on the east side of the railroad, and about 100 yards from the track. It is north of the crossing where the accident occurred, between a quarter and half a mile. There were some people going down the road from church, and I had been to church, and had gotten in my yard and was standing there. My attention was — to these people as they drove on down, and then I heard the train coming. I first heard the train running. The noise made by the moving train, yes. Then I heard him blow his crossing signal. He first blew for the crossing north of my house. That crossing is known as the "Armanda Wade Crossing." Then I heard it blow south of my house, the crossing signal. I could not tell you where the blow post is located that he blowed for, but the second time he blowed, he was south of my house. He blew two long and two short blows. I didn't hear anything more until I heard him just a minute or two after he blowed that crossing signal, when he blowed two very short blasts. Yes, I have stood at that crossing to
104 see how far I could see a train approaching, I standing at a point a little west of the crossing in the dirt road. Standing at a point fifteen or twenty feet from the crossing, you can see up the road north a quarter of a mile. There is a space of 50 or 60 feet between the crossing and the hill on the dirt road, where you can see the track by looking. And any point in that 50 or 60 feet you could see a train coming, I should judge, something like 400 yards.

No cross-examination.

JOSEPH WALDEN, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I remember the occasion when the Kings were hurt at Mag Wade's crossing. The train that is said to have hurt them passed me. I was right up nearly even with Mr. Charley Wade's house. I was walking within thirty or forty feet of the railroad track. I was first attracted to the train by hearing it coming behind me. It blowed behind me. It blowed like it usually blows, the crossing whistle. It was up at the other crossing, I suppose, about half a mile away. It blowed again just as it passed me. I think there was a blow post right there. It blowed just as it passed me, and then just a little below me. When it passed me it gave the common signal they always give. I heard it blow again, yes. My attention was drawed next to two blows where it killed Mr. King. I heard considerable noise there, but I knowed there was something wrong. I mean a noise made by the whistle of the engine. I could not tell you how many blasts, but two or three. Yes, I have looked to see how far I could see a train approaching from the north when I was standing on the crossing, and a few feet west of the track. If you stand right on the crossing, you could see it up, I expect, 70 or maybe 100 yards. I mean, you can see the track, and you could see the train all the time for nearly a mile. From the foot of the little hill, going in the direction Mr. King was, after you get to the bottom of the hill, and thence to the track, the character of the land is level for that 60 or 80 feet. In that 60 or 80 feet I think there is a little cut that will hide a part of an approaching train from your view. You could get within 20 or 30 feet of the crossing going in the direction Mr. King was going before
105 you got to the point where you could see the train around that little cut. From that on you could see it, yes.

Cross-examination.

By Mr. ARNOLD:

I heard the train blow before it got to me, at the crossing above, and it blowed as it passed me. Yes, it blowed again. I did not pay special attention to the blowing until I knowed there was something wrong. I was paying attention when it passed me, and it blowed again. No, I did not know an accident was to happen. I had been on the track. No, I was not scared the train was going to hit me. I cannot tell all the places the train blowed that day. No, sir; I have not been talking with Mr. Falkner, nor with Mr. Gaston about it. No, I did not tell them what I was going to testify to. I told Mr. Strickland what I knew about it the other night. I told some of my neighbors around what I saw. There were three or four of my neighbors in the crowd. I don't know who subpœnaed me. The first subpœna I got was from a bailiff up in Clarkesville, and I don't know his name. Yes, I have and do swear that I have never talked with Mr. Faulkner or Mr. Gaston about this case. I suppose the railroad company is paying my ex-

penses down here. I don't know what they pay a day. Oh, yes, I got two dollars a day at Clarkesville. I don't know how many blasts it blew for the crossing in question. I just suppose it was the crossing signal. I think it blowed two blasts. I could not tell you whether they were long or short; not very long, and not very short. It blowed once as it passed me, and it blowed a little piece below me. Yes, I heard it blow again as it hit the old man. I don't remember how many times it blew as it hit the old man. There was no one took me down to that crossing to see how far I could see up from the crossing. Of course, I have looked at it. At that time I was not expecting to testify in this case. If you had seen a man killed, would you have looked? No one ever talked to me about what I knew about it. I was on the railroad track when it happened. I told you I told some of my neighbors there about it, over a year afterward, and I suppose that's the way they found out what I knew.

By Mr. STRICKLAND:

I live now in Habersham. I lived above Clarkesville then. When I was subpœnaed for the Clarkesville Court is the first time I knew I was to be a witness. Yes, then I had a talk with you.

106 J. D. TERRELL, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

Yes, I was acquainted with the deceased, Mr. King. I have known him all his life, or about so. He was in the Confederate war, and that has been 44 years, and it seems to me he was about 21 years old when he went into that, or a little over. I will give him 64 years old. I know he was that much, if not more. Yes, that age at the time of his death. From what I know of him for several years after the war, he was not of much account, or claimed so to be. He did not work at all. He looked bad; looked unhealthy and claimed to be unable for service. I know he came to my house at the time he was getting up a pension, and said he was a broken down man, unable to work. That was several years after the war; two or three years after. Oh, yes, I have talked with him the last year or so before his death. Every time we would meet he would say he was a broken down man. He looked bad. He was sallow; he looked as though he was telling the truth. I should not think a man in his condition would be able to make a great deal. I should not think he could make more than fifty dollars a year.

Cross-examination.

By Mr. ARNOLD:

No, he could not take care of his wife and family on fifty dollars a year. I would not say he could take care of his wife and daughter and himself and pay taxes on his two farms on less than three or four hundred dollars a year; no, sir. I think he held his property and took care of it. I have heard him say that

he was in debt, but I don't know myself really that he was in debt. I don't know much about his labor; no, sir. I lived about three miles from him. Sometimes I saw him not oftener than once a week. Sometimes I would meet him in Bellton. Yes, some men with a chronic habit of complaining get along very well. Yes, he complained of being in bad health after the war. Yes, he lived forty years after the war, and made a living for his wife and family; took care of them, and kept his two farms. I will admit that some men *are* in ill health, with good heads, can manage well, and are worth more then men who are well sometimes; but he was not such a powerful manager, according to my knowledge. He did not sell any of his property that I know of. I think he took care
107 of his family. He complained that in the war he got the measles and had a breast disease. Yes, he lived a long time after the war. I don't know anything about his paying out doctor's bills. His wife ought to know better what he could do than I do. She lived with him and ought to know. Yes, he kept his two farms intact, and raised a family of eight or nine children, and took care of them, but they have all left. I suppose he took care of them when little. Most of them are married off, but not all, I guess. Yes, he did do well for his condition.

By Mr. STRICKLAND:

I suppose his nine children took care of him, and there is probably where the trouble came in. His children worked for him, of course.

T. F. HILL, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I live in Banks County and am ordinary of the county. I knew Mr. A. O. King. I was ordinary of the county in 1903, and still am. There has been no administration of A. O. King's estate. I do not know anything about what estate he had when he died. I had not been much with him since he made application for a pension. I don't think I saw him but once or twice since then. He made application between 1889 to 1890; I would not be positive what year. I sent the application down to the Pension Office. I have searched that office for it since, with "Tip" Harrison—Colonel Tip Harrison. I believe Mr. Faulkner was with us. We did not find it. He said it might be in the office, but it would take a good deal of work to find it. He told me that he would make search and let me know later on. Well, I did not make search particularly, because I thought it would be too much of a job, and I told him I would be down later on and assist him. He told me he would have the clerks look it up and send it to me. I don't know where it went to. Mr. A. O. King brought it to me. I don't remember that he told me at the time he made application what his complaint or condition was. I told him he would have to get two doctors. I think Colonel Oscar Brown assisted him in filling out the application. It has been three or four or five years since Mr.

Faulkner and I went down to Atlanta to make search for it.
108 We went down there since this accident. I have not been to Atlanta since. I would not count him a very stout man. He might do light work, or something like that; light farm work; I think he might plow and hoe, and knock around the house, but I don't think he could have done manual labor. He was asking a pension as a Confederate soldier. I do not remember what disability was mentioned in the application. He claimed he was not able to work. It had to be that in order to obtain a pension. I don't remember about "total disability" being claimed. He did not get the pension. I think he could do work of a light nature.

Cross-examination.

By Mr. ARNOLD:

I say he was not stout; I mean he was not a fine, healthy, athletic specimen of a man. Yes, I have seen men of his age getting around and doing considerable work. I think he could have done plowing and hoeing, feed the stock, and little things around the house. I could not say whether he could have done work around the farm, counting the management and all that, worth thirty dollars a month. I don't know how many farms he had. No, he had no administration on his estate. There is usually an administration when there are debts, and no administration frequently when there is no debts.

OSCAR BROWN, a witness called and sworn in behalf of the defendant, testified as follows

By Mr. STRICKLAND:

I am an attorney at law. I remember that I did make an application for a pension for Mr. A. O. King. I assisted him in filling out the application for him. I don't remember distinctly the grounds on which he asked for a pension, but I think it was rheumatism. My recollection is that he said he had contracted rheumatism in the Confederate service. I don't remember what he said as to it partially or totally disabling him from work. I don't remember distinctly when that was, but between February, 1889 and 1891. The only trouble I recall him having was rheumatism.

109 Cross-examination.

By Mr. ARNOLD:

Yes, a good many people with rheumatism do considerable work, especially the old soliders. It was somewhere about fourteen years before his death that this old man made application for a pension. Yes, he got along fairly well after that, so far as I know. Judging from his appearance, I think he was a man who could hoe, attend to his team, feed his stock, and do things of that sort. No, he was not an invalid, or a bed-ridden cripple. My recollection is he said he contracted rheumatism in the Confed-

erate service. My recollection is that his application was pigeonholed and refused. I think anybody who could show that they were disabled in any sort of way were entitled to a pension if contracted in the service. Not necessarily completely disabled.

T. S. FULLER, called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I know Miss Inez King. I remember the occasion when she was hurt at the crossing. I saw her the night she was hurt; the night the old gentleman was killed and she hurt. It was about dusk; I went over to the house, going into the door where the old gentleman was lying, and came on up into that house; stopped a minute, and there was a right smart racket going on in the kitchen department, the big house it used to be called, and some old ladies were in there, taking on mightily. I went on in there, stopped a minute, went out of that door from that house, and met this young lady coming from towards the cow pen with a bucket in her hand. That was the night of the day she was hurt. I stayed there quite a while. I did not stay all night. I was there at the inquest the next day, and saw her again that morning. She was then knocking about as usual. I did not see her again for the next two or three weeks. We had part of the inquest there, and then went to where the railroad boys were to come, to finish the inquest.

By Mr. ARNOLD:

I don't know whether she was suffering pain at the time she had the milk bucket or not. Oh, certainly, her back and side may have been hurt, and me not know it.

110 By Mr. STRICKLAND:

She was up a while that morning, and I saw her then in a little while in a little room on a pallet. I could not say when she got on the pallet. I could not say what caused it. A few minutes after I saw her on the pallet, Dr. Oslin walked into the room, and I walked in right behind him. I could not give a definite time as to how long that was after I saw her up, but it was not long. Col. Howard Thompson came with Dr. Oslin.

By Mr. ARNOLD:

No, I did not know Dr. Oslin was coming until I saw him there. I have lived at the same place since then. No, I have not seen this young lady at home frequently. I saw her last September in the chair at Clarkesville, and I don't reckon I have saw her since. I suppose it is two and half or three miles that I live from the family. I have known them quite a while. I did not go over there that night out of curiosity, but as a neighbor, and because he was killed. If he had not been killed I would not have been there. Yes, I have visited the house before. No, I don't know anything about the young girl's physical condition, except I saw her with the milk bucket that night.

LEVY WADE, called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I know Miss Inez King and remember the occasion when she was hurt. After she was hurt I saw her at home. I seen her toting a bucket of water from the spring. That was about two or three weeks after the accident, I think. Yes I have seen her doing a few more things. I saw her toting a baby along about the same time. I don't remember now hardly what else I saw her doing. When I saw her toting the bucket of water, and toting the baby, were on different days. I talked with her after she got to the house with the water. Oh, yes; I know it was her.

Cross-examination.

By Mr. ARNOLD:

Yes, that was two or three weeks after the accident. I don't remember when she got down and began to use this
111 chair. Yes, I saw her doing some other little things along about that time, but I do not remember what all. Yes, I have seen her since she has been using this chair at church. I was right close to their house on these occasions; picking cotton for them. I am not the daughter of the man who lives in front of the railroad there. I am the daughter of Harvey Wade. Charley Wade is my uncle. I could not tell what kin I am to Mack Wade. Yes, all the Wades as witnesses here. I forget the name of the man who brought me down here as a witness. Yes, I came on a pass. They told me they would pay me two dollars a day, yes. Mr. Faulkner is the one who talked with me about this case.

A. N. SHORE, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I know Miss Inez King. I saw her about two weeks after the accident, walking out on a little path towards the shop. No, she was not in the roller chair; am sure of that. I did not see her any other time after the accident. That was ten days or two weeks after the accident.

Cross-examination.

By Mr. ARNOLD:

Yes, that was about two weeks after the accident. I reckon it was before she began to use this chair. At the time of the accident I had been to a meeting and was going home. I was, I reckon, a mile and a half or two miles from the accident; north from the place of the accident. I disremember whether the old man with the whiskers was there at that time or not. There was an old man there, but I could not tell you who he was. I don't remember whether Mr. Waldrop was with me or not; I don't know whether

it was him or not; I never saw him before. He looks mighty like the man to me. No, sir; I have not known him all my life. I don't know that I ever saw him before. I don't know whether I heard the train blow or not. I don't remember. This old gentleman was pretty close to me. I expect as close as from me to you. Him and old man Edwards were standing there. We three were standing there talking when the train went by. After the train got out of sight, we all started home. We watched the train go out of sight, and
112 then we started on. Yes, that was a mile and a half above that crossing I expect. It was not running so very fast; just going moderate. Yes, I heard it blow, I think down the road. No sir; I have not stated repeatedly that it was running as fast as any train I ever saw; it was running just about like it always does. I could not tell you how many miles an hour. No, this old gentleman and I were not on the track. The road runs around by the side of the railroad there, but I disremember how far it was. Yes, I have seen old man Waldrop at Court. I have seen him to-day in the room here. Yes, I think I understand the one you are talking about.

By Mr. STRICKLAND:

We were up this side of old man Shurbrick's crossing. Yes, there are two trains that pass there about the same time, but the one I saw was coming down. I don't know whether there is or was a train that came down about the same time this one did. I don't know whether it as the same train I was looking at, that struck him, or not.

MARTI SHORE, called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I know Miss Inez King. Yes, I saw her within a few weeks after the accident in 1903. I saw her knocking around in the house and going to the door, taking her sister's baby up and come back with it, to save it from falling out of doors. It was a right smart little child, running around and walking about. I don't know how old the child was, but a year or over. That was on the 21st of October, in the same month they were knocked up in. Her father was buried on the 13th, and I was there the week after, on the 21st. I did not go there the night Mr. King died, but on the next day. I saw Miss Inez then. I cannot tell what she was doing, but she was knocking around, helping them get dinner. I don't know anything to tell in particular but that she was knocking about.

Cross-examination.

By Mr. ARNOLD:

No, I have not been there time and again since this little girl has been confined to her chair. I have not been
113 there—it will be two years the last of this month, or the first of next, when she was bad; they telephoned her brothers and sisters; they thought she was dying. Yes, she had a bad spell. She was in bed, but I cannot tell her feelings. I was there at that time,

and one time after Christmas; after I was there on the 21st of October. It was after Christmas, but I don't know whether it was January or February after. When I was there after Christmas, she was not in the chair, but in bed in her room. She was not having bad spells then, she was just back there in the bed, and them is the only three times I have been there.

By Mr. STRICKLAND:

I cannot tell you the day of the month she had that bad spell, but it was the last of April or the first days of May, 1904. There were several there that day, I cannot tell you who all. There were no doctors there. I did not hear tell of the doctors being there that day. There were none there when I was there.

M. C. BEATTIE, called and sworn in behalf of the defendant, testified as follows:

By Mr. ARNOLD:

I know Miss Inez King, and I saw her the night she is said to have been hurt during that day. She was then helping get supper cooking. I saw her again in about three weeks. She was then eating dinner, got up and took a chair, and went and sat down by the fire. I had but little talk with her myself the night she was hurt. I heard a conversation between her and Mrs. Masters. I heard her say it did not hurt her, or she was not hurt; something amounting to that.

Cross-examination.

By Mr. ARNOLD:

Yes, that was the night the old man was killed. I heard her say she was not hurt. She was then standing at the table. Nobody asked her if she was hurt. They were talking about something that way, and she come around and said that. I don't know whether anybody else heard it, but they were standing there. Mrs. Masters heard it for one. The old lady King was there, but I don't know whether she heard it. She was in the house. I don't
114 know whether Mr. Dodd, the son-in-law, was in the house or not. I reckon he was around there. I don't know whether Taylor Dodd was there or not. I could not tell you how many people were around there. There were several people there. I first told this to Mrs. Marti Shore; and I also told Mr. Faulkner so. No, I never told that young gentleman that. I don't think I have talked with him about it. He subpœnaed me. Yes, they brought me down here on a pass and pay me two dollars a day. This is the first trial of these cases at which I have testified. I am not the wife of Ham Dodd, but of Hamp Beattie, and we live in Banks County, about a mile from this crossing. My husband was with me that night at Mrs. King's. I went over that night just because I heard he was killed; I think I know these people very well. I have not been to their house since the young lady has been confined to her chair. I have only seen her once since, and that is at Clarkesville. I was there in three weeks after she was hurt. No, I had not seen Mr. Faulkner before I went there, nor Mr. Gaston, nor Mr. Quillian.

M. P. BROWN, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I know Miss Inez King. I saw her soon after the day she was hurt at the railroad crossing. I saw her coming from the spring something like two weeks, or ten days after she was hurt. She had a bucket in her hand. Mr. and Mrs. Hamp Beattie were standing by the buggy house. I did not see her another time out of doors; no, sir. The spring is about a hundred yards from the house, and may be more. There was nobody with her. I was within twenty-five steps from her. I then lived about a mile from the Kings. I now live about eight miles from them. I left there the twelfth of last January. No, I don't know when this roller chair went there. Yes, I know it did go there. I don't know that it has ever been away from there since it first went there.

Cross-examination.

By Mr. ARNOLD:

Yes, I know Frank Yarbrough, and have talked with him. No, I did not tell Frank Yarbrough that the railroad company would give two hundred and fifty dollars apiece for wit-
115 nesses to beat this case, and that I was in for the money. I never told him that, nor anything like that. No, I never told Frank Yarbrough that I was going "to ride your horse to death to beat this case." Yes, I know Mr. Faulkner and Mr. Gaston, and have talked with them about the case. Not before they subpœnaed me. I did not help find witnesses for them, or either of them. Yes, I swear that I was never present when any witnesses were subpœnaed. They pay me two dollars a day for what I have done for them in this case. I could not tell you how much I have done. I attended the Clarkesville Court, but was not put up as a witness. Yes, they paid me two dollars a day there, and never put me up. No, I don't know that I "have been going on messages in this case and riding for them and seeing people." Yes, I went over to North Masters one time, and they paid me fifty cents for that trip.

By Mr. STRICKLAND:

Mr. Gaston asked me to go over there to see if I could find Masters to give him a subpœna. Yes, I was hunting for a man to give a subpœna to for Mr. Gaston, and he gave me fifty cents to go and do it.

By Mr. STRICKLAND: I now read the evidence of H. H. MASTERS, by consent, as follows:

"I went to the residence of the Kings about three weeks after the accident; saw Miss Inez King walking about, and saw her coming from the spring with a tin bucket in her hand."

By Mr. STRICKLAND: I now offer in evidence the testimony of C. N. Wade, taken from the record of the trial in Clarkesville and used by consent.

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Dr. G. HATHCOCK, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I am a practicing physician and have been since 1888. As a physician saw Miss Inez King soon after she was hurt in 1903 at the crossing. I suppose I saw her in an hour after she was hurt. I did not examine then, no. I don't know exactly
116 what she was doing then. She was around her father, who was lying in a dying condition, when I first saw her, and she was lamenting, or something like that, in mental anguish. I went down to the house with the old gentleman. I made an examination of her that same afternoon. I found a slight bruise on the hip, or near it. I don't remember which hip now. The bruise was what I call a slight bruise across the illium, or top part of the hip bone. I did not find anything else. She was not complaining then at all. It was quite a while after that that I saw her again. It was probably a month before I saw her any more. When I next saw her, I was sent for. She had some kind of an attack subsequent to this first time I saw her, which seemed to be intensified, or got worse. When I went to see her that time she was in bed. I don't just recollect how long that was after the accident, but three or four weeks. When I saw her that time I thought she was suffering with painful menstruation; that's what I thought. I gave her something to relieve that. I saw her continuously for several times following that particular period; she and her mother both. I treated both of them after that time. Her mother was still suffering and still sick with a bruised hip, also, and much more probably than the younger one. I don't know just how long I continued to treat them, but I finally drifted out of the case. During the time I was treating Miss Inez I was treating her for menstrual derangement, or some functional disturbance of the reproductive organs, and for a slight mal-position of the uterus; a version of the uterus, which only demonstrated the menstrual disturbance. Female trouble is what it is usually called. It was probably in January after she was hurt that I saw her in company with other physicians. She did not seem to be satisfied, and Colonel Thompson asked me if I would object to a consultation, and I told him "No, sir; I would be delighted to have any good man he would suggest." He said, "have you any special man to suggest?" I said "No; any good man; Dr. Bailey, Dr. Ham, or any good, reputable man who was likely to understand such complications and such a disease as she seemed to be laboring under." Dr. Bailey was a specialist in female diseases; and he rather impressed me that he would get Dr. Bailey to see her with me. When the consultation resulted, it happened that Doctors Ham and Goss were there. I don't know at whose invitation Dr. Goss went there, but I think it was Colonel Faulkner's. That is my recollection. Yes, we got together and had a consultation, and made a pretty thorough ex-
117 amination of her. I had examined her before for myself. At this January examination all the doctors examined her; made a physical examination and examined the uterus carefully. Yes, we found trouble with the uterus. We decided that it

was anteversion. A version of the uterus is usually understood to mean the body of the uterus turns either one way or the other; that is in a version the entire body of the uterus turns. In this case the top part of the uterus had fallen forward, the uterus was not necessarily bent at all. Of course, if the top falls forward, the cervex would naturally be restrained; but you can philosophise on that the other way perhaps. I don't know that that is a common thing in maiden ladies. The history of such cases as that shows that such things often occurs in maiden ladies; and some of the authorities say that slight version is the normal condition. I could not say whether that condition was of long standing or not. Yes, we examined her reflexes for nervous troubles of various kinds. We found no particular symptoms directing our attention to any spinal trouble. While we found no intimation of nervous trouble, she was very nervous. That nervous condition may be attributable to many different things. If the uterus is affected in any way, you will get an almost innumerable train of symptoms, from uterine disturbance to nervous trouble. You will likely have great disturbance, almost anything will occur, with much derangement of the roproductive organs. Yes, we decided upon a course of treatment, which treatment was for "female trouble" was the principal trouble, and everybody concurred in the prescription we decided upon. No, I did not see any necessity for a plaster jacket. I don't remember the date I saw her next; possibly it may have been a week, but I don't remember. The prescription we decided upon seemed to do her some good, and she acknowledged that she was much relieved by that particular prescription. That was in January, and I continued to go occasionally up until warm weather. She did not seem to improve any, and I drifted out of the case. No, sir; I did not make anything like a thorough examination after January. I examined her yesterday, but I do not call that a thorough examination. We examined her pretty thoroughly for her nervous trouble that possibly would arise from the spinal region. It is very difficult to ascertain positively whether or not the trouble existed in the spinal region. The trouble she now suffers with or labors under, it is very hard to determine whether or not it is of the spinal region; and then the character of the nervous trouble was one question of debate. Yes, we found her very nervous yesterday when we undertook to examine her. The
118 amount of excitement in a patient to manifest a disturbance would largely depend upon the temper-ment of such patient. I should call her temper-ment a nervous one. I knew her before she was hurt. She was of a nervous temper-ment. She is not — a billous temper-ment, or anything like that. "A young girl of her temper-ment, with a slight womb trouble, if she should stay in the house for two or three years; take no exercise; going about in a roller chair; taking practically no treatment, and had no spinal trouble," such a line of treatment and surroundings and environment are liable to produce similar symptoms, and the identical symptoms we found in her case on our examination yesterday. As to whether these symptoms are produced by any one cause, or from spinal trouble, we have a way of differentiating between lesions, symptomatic trouble and

real trouble. I think the disease from which she is suffering I would understand as from a traumatic source, which means from any sort of injury or blow, and would call it traumatic hysteria. If my diagnosis is correct, that she is suffering from traumatic hysteria, the fact that she has a case pending would be one of the conditions that would be very conductive of the symptoms we found. The termination of the case, I would judge, would enter largely into and be one of the prime factors in her recovery. With the excitement of the case off her mind, I would say that I don't know that she would get well; I would be very slow to say positively that she would, but I think she would. Nobody can tell, but I believe her trouble is amenable to treatment, but it takes a good deal of time, and depends greatly upon the surroundings, the environment and the confidence of the patient to cure a patient like that. A patient who has been in bed for two or three years with traumatic hysteria takes longer time for them to get well. My home is at Bellton. I am professor of materia medica in Atlanta. I spend the winters in Atlanta, but my proper home is at Bellton. I am also a member of the State Board of Health.

Cross-examination.

By Mr. ARNOLD:

Yes, I am professor of materia medica in the Georgia Ecclectic College at Atlanta. I have been practicing since 1888. I am the local surgeon for the Southern Railway. I found a bruise on her hip. Yes, you will have concussion when there are no outward evidences of it. Yes, severe violence will some-
119 times cause death, when there is no outward evidence of it, or broken bones; and I have heard of people being scared to death. Yes, you can have a rupture of the blood vessels. The spinal cord is not subject to hemor-hage; no, sir; that is, the marrow inside the spine is not. The medulla oblongata is one end of the spinal cord, and the spinal cord is a continuation of the medul-a oblongato. The spinal cord seems to be the fountain head of the nerves and tissues which spring from the cord, yes, first we have the marrow, and then around that we have the bony structure, which bony structure consists of what is called the vertebra; little segments of bone; and around the whole thing you have a system of nerves and muscles that go up and down it. Oh, yes, it is possible to very severely strain the nerves and muscles that go up and down the spine. It is possible to get up an inflam-ation in the cord by a severe shock or violence. No, I don't know that inflam-ation would frequently happen from shock. It does happen from concussion; it is possible, yes. This young lady, when I examined her in January, had a version, or mal-position of the womb. Anteversion is simply a turning forward. Violence frequently produces that, yes. Yes, the womb is suspended in the pelvic cavity, like a balloon, and is held in place by a broad ligament, and smaller ones; and is shaped like a pear. The fundus, its top, points towards the umbilicus. Yes, a violent blow is subject to stretch or rupture these ligaments,and if stretched too much on one side, that will let the womb be pulled to the other side. The

womb of a woman is very delicate and susceptible to changes. Yes, it is true that a woman who has had children, and whose womb is big and heavy, is much more liable to have it out of place than a maiden woman, or a young girl that has never conceived. The womb of a young girl is a very small thing. In a girl fifteen years old it would be larger than your thumb, but it is a very small organ. She is not nearly so liable to have it injured as an older woman who has had children. Yes, when this displaced condition of the womb is formed, it is liable to form adhesions. Yes, the inside of the womb has a musuous surface, and if it comes in contact with some thing, it is liable to form adhesions. When a new formation is occur-ing, you are liable to have more acute symptoms. You can have fever and inflammation or any train of symptoms, as I mentioned before, with a uterine disturbance; but a simply prolapsed uterus is not liable.

When the injury is fresh, the patient is much more apt to feel
120 pain and inflammation than if it is a case of long standing.

Yes, I thought it was her menstrual period that troubled her. I found the womb slightly out of position. Yes, she had pain at that time, or complained of it. It is true, yes, that in all cases of nervous troubles a great deal depends upon the history of the case in making a diagnosis. I don't [think] this condition of the womb can be cured by an operation. I think the trouble we found, that is the last I have any knowledge of, was of such a nature that it is liable to result possibly in a process of natural development of her age and all that, in a permanent relief, and that she will get well all right. Yes, I think after a while she will get well. No, I cannot tell about that. I don't think it necessary to perform any surgical interference. Yes, they do operate in such cases; if they find a ligament that is too long, they take it up. Yes, they can sever it; but that is a question you know, in fact, that operation at the present time is fast fading out. We have another operation for that particular feature, to leave the ligament alone, and take the tension off by stitching the fundus to the abdomical wall; go down to the public region, and stitch that up, and the patient will get well. No, I have never been called upon to treat this girl for any womb trouble. Yes, I have been living in the settlement a long time. To the hypothetical question: "Suppose this girl is fifteen years of age, has never felt any pain; no doctor had ever been called to treat her; has just the ordinary experience that an average country girl has had, and suppose she was in an accident by which she was thrown out of a buggy anywhere from 12 to 20 feet in the air, and fell to the ground striking, as some of the witnesses think, in the neighborhood of the spine, anyhow the whole body indicating a very severe shock; and suppose after this these symptoms develop, wouldn't you naturally attribute it to the fall?" I would answer: Under those circumstances I would naturally think so. It depends entirely on the severity of the injury in a spinal trouble, especially where the inflammatory process is going on, whether the symptoms develop instantly, at the time of the injury is inflicted, or whether they are progressive. The same injury could produce shock that would produce death. Some cases might produce unconsciousness, and the patient get up and be all right; and some might not be so severe as

to disable them at the time, and this process starting to work, might eventually disable them; but that is a different character of the injury. That injury would be what we call traumatic neurosis. Yes, some doctors call it traumatic neurasthenia and some traumatic neorosis. Yes, the most difficult cases with which doctors
121 have to deal are cases of traumatic neurasthenia or neurosis. We do not have to rely upon what the patient says about suffering pain; we cannot tell whether the patient has stomach ache or not, but we always find a different expression in the face, according to where the pain is. Traumatic hysteria is one of those peculiar nervous troubles without any practical pathology. The simple fact that the male does not have a womb does not render him immune from traumatic hysteria. If a woman has also a prolapsed condition of the womb it is liable to intensify it. Yes, in these cases of traumatism, whether called traumatic neurast-inia or traumatic neorosis, the patient is liable to go to pieces from excitement. Yes, there is a lack of co-ordination in walking in this case; or in standing, or in any physical effort which requires the patient to direct his mind and muscles to one particular object. I do not think any conscientious physician would say positively that this young lady will get well; but on the other hand I think it possible for a conscientious physician to say that she has no structural change that will result in permanent injury. I find in her case that the reflexes are exaggerated, which shows a nervous condition. I think she is suffering from traumatic hysteria, and the difference between traumatic hysteria and traumatic neurast-enia is very marked, and very striking, and the outcome of the case, or the progress of the case is quite different. Yes, I found the knee jerk in her very exaggerated. If we made the usual test for traumatic neurast-enia, we rather look to find if it did exist, whether the young lady is really suffering from traumatic neurasthenia or traumatic hysteria, and the only positive way of arriving at the difference between the two particular conditions is by a comparison of the reflexes and the way we measure these reflexes is simply by crossing the leg that way (indicating), and making a slight tap on the knee that way, which would, of course, respond very willingly. No, she did not know what I tested her for, but if she did, she could not help that. I do not know whether she was in a condition of nervous tremor after we put her through the test yesterday or not. I paid no attention to her afterward. No, sir; we doctors made a digital examination of her; it did not almost kill her, and she did not scream at the top of her voice. She made a little whining noise, but there was nothing like violence used. No, she did not scream. That examination was in January, 1904. No, sir; I did not tell Mrs. Masters the next day after the examination in January that I found a part of the spinal column extremely tender, for I never found it. I did not tell Mrs. Masters that, nor did I tell her I did think she would get well.

122 Redirect examination:

By Mr. STRICKLAND:

In this case I do not think there is any evidence of prolapsis. Version is not prolapsis. Yes, traumatic neu-

resthenia is indicated by being progressive. In this case I did not find the disease to be progressive. She is in fair condition now. She may be thinner than before, but the standard of life and her general expression is fairly good, compared with twelve months ago. Yes, I believe I could cure that patient; I believe that any reputable physician that could get the confidence of that patient could cure her. I believe the child will get well.

By Mr. ARNOLD:

No, I don't think a change of environment will cause a leg to grow back. I do not say that I know I can cure this patient. I expect I did tell her mother shortly after the examination of her in January, that I could do nothing more for her.

C. W. HUGHES, recalled, testified as follows:

By Mr. STRICKLAND:

The height of the dirt road is shown by that survey, and the highest point on the top of that hill on the west side of the track is thirteen feet, I believe, it is, above the top of the rail. The hill slopes toward the track, and at the track, the track is eighteen inches above the ground level there. While I was in the roadway department we had that raised on what was supposed to be six inches of ballast. There is a barrow pit on the south end, and that pit is about one hundred feet long, and goes back into the cut perhaps fifty feet, and it is about one hundred feet across it. Between the foot of that hill, coming down from the west towards the track, there is nothing in the least to obstruct the sound coming from the north. The ballast I spoke of along there is crushed stone. The bottom of the ballast had to extend out 24 inches from the rail on either side. As well as I remember, that does extend out that distance now. No, sir; there is no cut at the crossing. Just before it gets to the crossing, it strikes what is known as the grade point, and there is no cut there.

No cross-examination.

123 Dr. I. H. Goss, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I am a physician and have been for thirty years. I am surgeon for the Southern Railway located at Athens, Georgia. Yes, I have seen Miss Inez King two or three times. I saw her first in January 1904, and I think again in October of the same year, and then the other day. At the time I saw her in January it was in company with Doctors Ham Hatchcock and Mr. Thompson. We three examined her; Mr. Thompson was along, but he was not in the room. At the time we examined her, the examination was as thorough as there was any necessity for; we made a thorough examination. At that time there was very little evidence of any external signs of anything about her at all. The objective symptoms simply amounted to nothing at all; mostly subjective. Objective symptoms

would be anything you could discover, any lesions, or something of that kind and the subjective symptoms is what the patient says. We got no objective symptoms. She complained of pain radiating across the back and chest and down the limb. Yes, we made an examination to ascertain whether she had any womb trouble. The womb was in what we call an "ante position" it was forward. There was a little womb anteversion, or rather it was more in anteflection. Anteversion is simply a bending forward. In fact, the womb in its natural position is a little anteverted; and the womb had been in that position long enough to cause absor*b*sion of the anterior portion. That anteversion could not have been of recent standing. It would take longer time; the front part of the womb would have to be absorbed to a certain extent in order to allow flec*t*ion to take place. It would take longer than two months. The accident happened in October, and I was there and saw her in January and the anterior wall would have been too thin in order to allow flec*t*ion to take place. It is a common condition to find among females, and after doing a good deal of special practice on that line, I find a good many cases of that kind among young girls. Sometimes it is congenital and exists from birth. Yes, it can be produced in other ways: you can get it from painful menstuation; [menstruation]; in fact that is one of the causes of painful menstuation [menstruation]; a change in the womb sets up more or less inflammation in the womb. Nervousnes- will produce it in a way, but that alone will not produce
124 it. Yes, you can get it from injuries; a fall, or jumping; but in most injuries, the womb is turned backward, and not forward. I don't see how falling on her back could produce a displacement forward; it would backward, but not forward. It would take a fall the other way to produce that. I think we all agreed perfectly as to what was the trouble with this young lady. The great trouble of which she complained that day, was painful menstruation. We had to take her statement of that of course, but on examining the womb and finding it in that position, it bore out her statement that she had pain. There was no difference between us on that point. My recollection is we prescribed that day; a prescription that is usually used in troubles of that sort; a viburnum preparation, or something of that kind was the principal prescription; and she seemed to have some difficulty in passing water, (inflam-ation of the bladder) as stated by her, and her mother also made the same statement, about a frequent voiding of water. She had a little inflam-atory trouble about the bladder. That could come from various causes. In a case like hers, it could be caused from the position of the womb pressing against the bladder; and could be caused from what is called residual urine; the amount remaining in the bladder all the time. A person may not suffer from that at all. They do not empty the bladder as well as they do at other times, and the amount of residual urine ferments and sets up cystitis. She had pain radiating from the spinal cord, but we did not find any actual disease of the cord itself. I saw her next, I think in October, 1904. She seemed to be about the same thing. I saw her twice before then, and I must have seen her in the spring. I saw her soon after the plaster jacket was put on, and I think that was in June. Her con-

dition was pretty much the same then. I saw her next at the court in Clarksville, and she was then pretty much the same. I next saw her here the other day. The examination made this week was not as thorough as when I first saw her. We did not make any special examination of the genital organs. No, sir; we did not think it was necessary to make an examination (digital) of the genital organs. We examined her reflexes mainly; what is called the patilla reflexes. There were prsent Doctors Bloomfield, Hatchcock, Ham and myself, and the patient and her mother. The only objective was this reflex. Of course as to the nervousness we had to take the patient's word a good deal for that. Yes, we had to ask her questions about that. She answered some of the questions, but her mother answered most of them. The girl did answer some. She seemed to be terribly excited, and her mother said she could not answer them, and for that reason her mother undertook to answer them. I call her present condition one of traumatic hysteria instead of neurasthenia. In traumatic neurasthenia there is always an injury of some kind, a shock to the spinal cord, which produces symptoms different from what we get in this case. Taking the patilla reflex; in neurasthenia the reflex is exaggerated, but when you strike the knee, it is all over at once. In the case of the girl, you get the reflex, but there is a continuance of it, or rather more of a tremor. That is one of the distinguishing features of it. In neurasthenia you would also have a disturbance of the functions of the bowels, the bladder, and in fact all the organs, more or less, and no control of the nerves. In neurasthenia, as a rule (there are exceptional cases) it would not remain nearly the same as in this case; it progresses. In traumatic hysteria it would remain about the same without disturbing any special functions. When I examined her this week, I thought her condition was improved, except this extreme nervousness. Yes, hys-eria is a general disease itself, and so far as the patient is concerned, it is just as real as anything else; and in a great many cases where you can find no patent cause, they have the hysterical condition just the same. Traumatic hysteria to remove all the causes is more easily cured. Traumatic neurasthenia would be more progressive, and fewer cases relieved entirely. In this case, from my knowledge of this case, and the history of it, and the examinations I have made, I think the lawsuit, and the excitement about it retards her recovery. In the case of every nervous patient, you have to have the confidence of that patient, and of course you have to have good surroundings and treatment to a certain extent, and in a case of that sort, without more injury than the girl has got, I do not see any reason why she should not get well. In all nervous cases, the physician has to have the confidence of the patient, else the treatment don't amount to a great deal. Hyst-ria, to make it plain, is simply a disease of the nervous system. There is no real pathological or diseased condition that can be found, but simply a nervous disorder. Sometimes hysteria may be based on some other disease, and may be a symptom instead of a disease. You can have it in most any part of the body. Yes, a man may have hysteria, and have a still leg.

126 Cross-examination.

By Mr. ARNOLD:

I examined this girl first I think in January 1904. I went there as the surgeon of the railroad. Yes, I am also a brother-in-law of Mr. Strickland. Yes, I found an anteverted condition of the womb, or more of an anteflection. In anteversion, the whole body of the womb turns forward. Anteflection is when it is bent upon itself like my hand is now. (The doctor nor [now] draws a diagram of the womb anteverted, and anteflexed.) The anterior wall is back here. No, it cannot well have a wrinkled fold in it that will allow it to give. I have examined a great many, and I have found them all thin. Anteversion can take place, but as a rule it is a displacement backward where they fall upon the back. Anything that will give force from above down may produce anteversion. I don't know that the contortions of the body on being knocked twenty feet in the air might produce it, before she ever hit the ground. A great strain might produce it. Any strain, by being thrown up in the air would not produce it. Yes, the womb is held up by a ligament. That kind of tissue cannot expand and contract. Yes, it is true that a blow on one side of the head will produce a fracture on the other side of the head. Yes, one of the symptoms of this change in the condition of the womb, was painful menstruation. The menstruation comes from the womb. If there is no abnormal condition of the womb, there is pain attending menstruation, but the flow does not come through a new channel, but through a narrow channel. Yes, painful menstruation is one of the evidence that there is trouble with the womb, if there has never been any such pain before. To this hypothetical question; If this young lady had no trouble with her womb, before, and had fallen from a buggy, exactly how we cannot tell, but she was thrown from twelve to twenty feet in the air and some part of her body hit the ground, and after that, in two or three months this painful menstruation for the first time in her life developed, and an examination disclosed that there was an anteversion of the womb; a turning of the whole body of it, what is there except the violence to attribute it to? I would answer: "If there had never been any trouble there before, you can attribute it to something like that; but some cases, if you will allow me to make this explanation the girl was about fourteen years old when she was injured. Some girls menst-uate [menstruate] for a
127 while at each period, more or less congestion taking place, and they get after a while, in two or three years, they have painful menstruation; and you cannot say it is always from an injury. But, of course, if there was no other symptom in it, and it followed this injury, the injury would be the most natural thing to attribute it to. Traumatic hysteria is hysteria due to an injury. Yes, it is a well recognized condition with doctors, in the last few years. I think this young lady is suffering from that more than anything else. That condition may last any length of time. Yes it might last her all her life, or it might not. Yes, that condition might result in paralysis of the leg or the arm; partial or complete paralysis. Of course if the limb was paralyzed, the patient is help-

less, so far as the limb is concerned. Yes, that is strictly a nervous condition, due to an injury of the nervous system, and it very seldom would come from an injury to the spine. It might result from a shake up to the nervous system, and if the person is inclined to be hysterical at all, it would naturally turn that way. Yes, if a person was inclined to be hysterical, any injury could produce that condition. To the hypothetical question: "Suppose this young lady had just been an ordinary country girl before this, and had lived as the average country girl has, and suppose she sustained a severe shock having been thrown from a buggy from 12 to 20 feet in the air, and striking on the ground a very heavy blow, suffering pains in the back and hip, and in the head, and her symptoms gradually got worse until the end of three or four weeks, or a month, she developed into this condition, what would there be but the injury to attribute it to?" I would answer that if a person is nervous and hysterical an injury would more likely produce that condition, and it could be attributed to that injury. She is of a nervous temper-ment [temperament], and the injury, shock and excitement, and all that, might produce it.

Redirect examination.

By Mr. STRICKLAND:

As to painful menstruation as produced by this condition of the womb, the flow would have to reach the point where the flow was obstructed, before there would be much pain from that cause. I never could get at it, as to whether she suffered pain before that or not. I asked the question a good many times, but never could find out. Yes, I stated that I thought she would get well of her trouble. As to what it would cost to cure her, would depend upon where you had her for treatment. In a case
128 like that she would have to be taken from the family, and to a good place for treatment, in other words, treatment beside medicine. You must take her from her present envioro-ment [environment], and as I said a while ago, the physician must have her perfect confidence, and then you could make it cost from five hundred to a thousand dollars. If I were going to treat the case, I would want her away from the family.

By Mr. ARNOLD:

No, I cannot say what is to become of this case.

J. C. BLOOMFIELD, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I am a practicing physician, and have been practicing since 1888. I am not a surgeon for any railroad, nor am I your brother-in-law. I saw Miss Inez King day before yesterday, in the presence of her mother, Doctors Ham and Hathcock, and Goss, and some other man. I don't know his name. There was another man who rolled the chair in, but I don't know who

he was. I really could not say whether that man (her brother) is the one or not; perhaps he is. We made a very superficial examination; it was impossible to make any other in the room. It was simply subjective, asking questions, with an examination of the patilla reflex. It was impossible, simply because she could not be stripped there and examined. It is a very difficult matter to say as to what her trouble is, she may have one of three conditions. It may be pure hysteria; it may be neurasthenia as a result of spinal irritation from an injury, or it may be entirely put on. You cannot tell as to which of the three it is. Of course a man may have his own opinion. The girl looked as though she suffers, and she is undoubtedly very nervous. I am not in a position to state which one of the three conditions it is. I never did see the case before then. I did not see anything in her case that would prevent a permanent recovery. I could not say as a physician whether she could be cured or not. It is absolutely impossible to give an opinion as to whether she would, or would not recover. As to the probabilities, I can give them; The probabilities are that she will recover. In order to affect a recovery it would be necessary that she be removed from the family; all mental causes of excitement removed,
and that she should be put under proper treatment, prefer-
129 ably in a sanitarium where she in entirely under control.
Yes, the lawsuit itself would be an exciting cause preventing her recovery. I should think the probability is she will get well. If the case was to come to me, I would give her a favorable prognosis, under these circumstances. To accomplish that, in a sanitarium, it would cost anywhere from five hundred up to possibly a thousand dollars, depending upon the length of time.

Cross-examination.

By Mr. ARNOLD:

Even then, I could not be positive that she would get well. You can look at her and see that she is very nervous. To some extent she looks enemic, but that might be her normal condition. I could not determine that the reflex was exaggerated. The moment the reflex was struck, there was a jerking all over the body, which made it uncertain. I told her nothing about the purpose in striking her. I think the nervousness all over is genuine. No, the condition of the womb cannot be put on. A woman herself cannot have the womb anteverted at one time, and then back at another time. That condition of the womb frequently follows injury, and follows a strain. I should judge that the straining of a person knocked up in the air by a sudden lick from a locomotive, and the straining of the muscles of the body while in the air, would not produce the condition of the anteverted womb; I should think it would be the fall that might produce it. Yes, the force of the first impact that knocked her out of the buggy might produce it. If the blow was very sudden, it may produce it, because the effect of that would be practically the same as a blow. Sometimes an anteversion of the womb is a very stubborn condition for a woman to have cured; it is as a rule amenable to treat

ment, however. Yes, you can amel-oriate [ameliorate] the situation and you can cure it. Yes, traumatic hysteria results frequently in an inability to use the leg, or the arm, or both arms. Traumatic hysteria is hysteria due to an injury. Traumatic neurosis is a case in which the spine is involved. In all these cases, to get at the true condition, you must get a history of the case; you cannot arrive at the truth without it. A great deal depends upon the honesty of the patient.

Q. Let me put this sort of a case to you: Suppose this young lady was fifteen years old, and had been an ordinarily healthy
130 country girl, and just about the average girl in that situation, and suppose she had been riding in a buggy over a crossing, and a train running anywhere from thirty to sixty miles an hour struck the buggy, knocked her father out and killed him, so violent was the blow; knocked her mother out, and knocked her anywhere from twelve to twenty feet in the air, and she fell to the ground, couldn't that lick in the buggy, without the lick on the ground, have produced this womb trouble?

A. Yes, sir. It could also produce this traumatic hysteria and could also produce traumatic neurosis; and either one of them could account for her present condition. It is possible that her injury may persist, but a majority of these cases do get well. Yes, I say the probability is, with proper treatment, she will get well. I could not say how long it would take to cure her. I don't know whether some of these cases last five or ten years or not. I don't believe any of those conditions would last a life time. I think they would last, under proper treatment, anywhere from six months to a year, or probably two years, and they would get well under proper treatment in that time. Some cases might persist longer. It is just possible that some would persist a life time. This womb condition is a mechanical condition and the way to treat it is by mechanical support to the womb, and keep it there long enough to get it in its normal condition, and the ligaments to regain their strength. In my experience, these ligaments, after they get their strength, the womb is held in shape by those ligaments. Yes, sir, the ligaments do regain their strength when once stretched. If the ligaments were ruptured, it would be permanent, but I never heard of one being ruptured; not the ligaments of the womb. Yes, traumatic hysteria is a painful condition to the patient. It is annoying and painful. As a rule, patients with hysteria, sleep well. Neurasthenics do not. Anteversion of the womb is an objective condition; that is something you can feel. And that reflex is an objective symptom. If a perfectly normal woman stepped suddenly off a step, may prolapse or antevert a womb, but it would take a very considerable jar to do that. Stepping unexpectedly off a step might do it, yes. Following this injury, if there is a tenderness along the spine, that might indicate any one of the conditions I spoke of; either the hysterical condition of the neurasthenic condition.

Q. Let me put this case: Take a girl, as I have said fifteen years old, never had any trouble before, and was thrown out of a buggy, and who dragged along three or four weeks, doing the best she

could, undertaking to do various things she had done before,
131 but got worse all the time, and at the end of four weeks was confined to her bed, and remained in that condition, or, as you find her now, to what would you attribute that condition, except to this injury?

A. Nothing.

Redirect examination:

Yes, I stated to Mr. Arnold that being struck in the rear would produce injury to the womb. If the buggy was struck, it would depend altogether on the amount of the jar the patient had; a jar or a blow, or a sudden lifting of the patient, that would give the same effect as a sudden dropping of the patient down. If the blow was from behind and upwards, it would probably produce retroversion. It might also produce prolapsis. If you had prolapsis you would probably have retroversion. A blow from behind would not *like* [likely] produce anterversion. Traumatic anteversion could be the result of one blow. Where the womb is in a bent condition, on the convex side you would *fine* [find] nothing, but on the concave side you would find a thinning of the wall of the womb. It takes time to produce that condition.

Q. Suppose the girl had an accident on the 11th of October, and in January following, she was examined, and this thinning of the walls of which you spoke was then apparent, I will ask you whether or not that was a sufficient time to produce that?

A. I don't know what time would be necessary to produce it. When a young girl reaches the menstrual period, painful menstruation is a very common thing. That is true of girls that have not been hurt. Girls of that age are frequently found not to be in a normal condition as regards the womb; you frequently find the womb to be crooked or bent, or not in position.

(Counsel for the defendant now offers in evidence the two maps referred to, No. 1 and No. 2. These are admitted without objection.)

J. C. BEARDEN, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

Train No. 39, is what is known as the local vestibule and No. 37,
is the other vestibule. *No.* [Nos.] 37 and 39 runs in the
132 same direction. I don't know exactly, but I believe they run an hour or an hour and a half apart. Occasionally they do run close together, depending upon whether one is behind time.

No cross-examination.

Here the defendants rests its case.

Counsel for plaintiff now reads in rebuttal the interrogations of Mrs. Harriett Masters, and Mrs. Dodd.

W. T. DODD, recalled in rebuttal, testified as follows:

By Mr. ARNOLD:

I know Mr. Wilson and his daughter. They came up there just after the accident happened. He then said that he had to run down off the fill to keep the train from hitting him. I disremember what his daughter said.

Cross-examination.

By Mr. STRICKLAND:

Yes, this was immediately after the accident. These Wilsons had come back from where they were to, where the old man was. They said they had to run off the fill to keep the train from hitting them. Yes, the train ran beyond where they were, and they ran "down the fill," they said to keep the train from hitting them. Yes, the train did go beyond where they were. Yes, I was examined in a former trial of this case at Clarkesville. I there stated that I carried Miss King to the funeral of her father on a sp-ing bed, not in a spring wagon. I don't think I stated that she had never been able to walk since she was hurt up to that time; I said she could walk a few steps at a time.

Q. Wasn't this question asked you: "Q. Has she been able to walk, except just in the house there on a chair, or something?"

A. After two weeks.

[Q.] Did you say anything about any two weeks at this trial? Did you not swear she never had been able to walk since the accident?

A. I think I did.

133 Q. "Has she ever been able to walk except just in the house there on a chair or something? A. No, sir." Didn't you say that?

A. I disremember. If I did, I didn't mean to swear that.

Q. "Has she ever been able to wait on herself or get out of the house during the entire time?

A. No, sir." Did you answer that?

—. I say after two weeks.

Q. Did you say anything about any "two weeks" there?

A. I disremember about that.

Q. I will ask you this: "Q. Do you remember when the inquest was held?

A. I believe it was on Monday.

Q. Where was she that day?

A. She was on her bed."

[Q.] Did you swear that?

A. Yes, sir.

Q. You swore at that time nothing about any two weeks. You said she was on her bed, not able to walk from the beginning?

A. I don't think I did. I would not be positive I did. It don't seem to me I did. When I had this conversation with Mr. Wilson,

it was right after they were knocked out of the buggy, and before he died. He lived something like an hour I suppose. Mrs. King was up, at that time. I disremember where Miss Inez King was. Yes, Wilson went on that train after a doctor.

Miss INEZ KING, recalled in rebuttal, testified as follows:

By Mr. ARNOLD:

Yes, I have seen Mrs. Beattie, Ham Beattie's wife. If I ever told her on the night of the injury or at any other time that I was not hurt in the accident, I don't remember anything at all about it.

Cross-examination.

By Mr. STRICKLAND:

I told you I did not remember for certain when it was I got my roller chair. Since that time I have not done without it part of the time. Yes, it has been at our house all the time. It was carried to Clarkesville. It was away several days. I said it was several days, I don't remember how long. I don't remember what day of the month it was. Yes, I remember it was in 1905.

134 By Mr. ARNOLD:

When the chair was taken to Clarkesville, I was in a plaster cast then, and I could walk a little better than since, and I sat in another chair. I just did the best I could without it. The roller is a more convenient way for me to get around than an ordinary chair. The chair was not loaned to Mr. Finley, at Gainesville. Yes, that is where it went. I did not know who the man was. Mr. Cicero Cagle came for it, and brought it back.

By Mr. STRICKLAND:

I don't know what Mr. Cagle's occupation is. I suppose he is as fat as you are. Yes, the chair was also sent to Clarkesville, at the last Court. I don't think it was sent about two weeks before Court, but a day or two. I have been there once. Yes, I think it was there only a day or two before me. Yes, it had to go to Alto, to put it on the train to go to Clarkesville. I don't know how long it stayed there, nor how long before I got it back.

HOWARD THOMPSON, a witness called and sworn in behalf of the plaintiff in rebuttal, testified as follows:

I had previous to the time the chair went to Gainesville, furnished the chair to the little girl, and during the time she had it. Mr. Finley was taken down sick, and was very feeble for a long time, and I was waiting on him. I went to Mrs. King's, and asked the little girl if I would furnish her a spring bed or a mattress or something for her to lie on, if she would let me have the chair for a little while for Mr. Finley. I had the chair brought to Bellton and sent to Gaines-

ville, and Mr. Finley used it for a time, and immediately after that, as soon as I could after his death, I sent the chair back to the little girl, and she kept it then until we got ready to go to Court, at Clarkesville. I went there and made arrangements with a livery stable man to put her on the spring bed I had furnished her and put her in a hack and carry her to Clarkesville, and had the chair sent to Alto, and from there by express to Clarkesville. When we were through with the case it was sent back to Alto, and then to her house, where it has been ever since. I don't think the chair was in Gainesville over a week. I put him in the chair and rolled him around his place one day, and he died shortly after that. Yes, he was an almost
135 dying man then. Yes, the little girl loaned me the chair. It is really my chair; I furnished it to her. It was left me by a friend, a man who died in Gainesville, and his wife gave it to me.

No cross-examination.

(Counsel for the defendant now reads in evidence a portion of the testimony of W. T. Dodd, taken from the record of the trial at Clarkesville. This is read without objection.)

Here the case closed.

Filing: Filed in clerk's office, 27th day of Oct., 1906. O. C. Fuller, Clerk; by J. C. Moore, Deputy.

This is the evidence complete, except certain maps and photographs and blue prints which it is -convenient to incorporate in said Bill of Exceptions.

It is ordered that the map or maps, photographs and blue prints, introduced in evidence, and, which are referred to in this Bill of Exceptions, and, which it is inconvenient to incorporate in said Bill of Exceptions, be made a part of the same, and that the originals of such maps and photographs and blue prints be sent by the clerk as a part of the record in the case to the Court of Appeals, and that such originals be considered as a part of this Bill of Exceptions. Let them be certified by the certificate of the clerk.

This November 17th, 1906.

WM. T. NEWMAN,
U. S. Judge.

We agree to the above.
This November 17th, 1906.

REUBEN R. ARNOLD,
HOWARD THOMPSON,
Att'ys for Deft. in Error.

Filing: U. S. Circuit Court. Filed in clerk's office, Nov. 17th, 1906. O. C. Fuller, Clerk.

136 We agree that the within is a correct brief of the evidence in the trial of the case of Josephine King, vs. So. Ry. Co., and of the case of Inez King vs. So. Ry. Co., except the maps and photographs introduced, and the depositions read, which are in the clerk's

office, and we agree shall be treated as part of this brief the same as if they had been embodied.

We further agree that this brief shall be used as the brief in each of said cases with the same addition of maps, photographs, depositions, etc., above mentioned.

This Oct. 27th, 1906.

JNO. J. STRICKLAND,
HOWARD THOMPSON,
REUBEN R. ARNOLD,
Pl'ff's Att'ys.

Approved upon agreement of counsel and ordered filed. Oct. 27th, 1906.

WM. T. NEWMAN,
U. S. Judge.

During the progress of said case, the plaintiff moved to rule out the question and answer propounded to Ben Dewberry, a witness for the defendant which answer was as follows:

There are between ninety and one hundred crossings on the Southern Railway, between the South Carolina line and Atlanta.

Plaintiff's counsel objected, as follows:

I object to the question and the answer, because incompetent, immaterial and inadmissible, I think the entire case should be confined to this crossing.

Defendant's counsel then stated, as follows:

"I expect to prove that between the South Carolina line and Atlanta, there are practically one hundred road crossings or between eighty-five and one hundred public road crossings; that the distance is one hundred and one miles, that the crossings in some localities are very close together, and within a few hundred yards of each other, and at others further apart, but on the average making about a crossing to the mile almost. We expect to show further, that to observe the statute, and check and keep checking so as to have the train
137 under control, and to stop should any person or thing be on the crossing, it would consume from five to ten minutes for each crossing, dependent, of course, upon the weight and length of the train and the grade; but it would make an average of seven or eight minutes. We wish to show that this train was made up and known as No. 39, the vestibule train which runs from the City of Washington, through the States of Virginia, North Carolina, South Carolina and Georgia, that it was carrying passengers from one state to another, also carrying an express car with freight on it, from one state to another. We wish and expect to show that obedience to that Crossing Act would hinder and practically prevent interstate business being done by the defendant railroad. We wish to show the conditions I have just stated all existed at the time this accident occurred on the 11th of October, 1903."

The testimony was excluded by the Judge, and an exception to this ruling noted.

At the close of the evidence, defendant's counsel moved the Court to direct a verdict for the defendant, on the grounds which are fully

set out in the sixth ground of the motion for new trial herein contained, which motion the Honorable William T. Newman, Judge presiding refused, and exceptions were allowed and noted. The case was then argued before the jury, and defendant's counsel requested the Judge in writing to instruct the jury, which requests are set out verbatum in No. 5, of the motion for new trial, herein contained.

The Judge then instructed the jury as follows

"GENTLEMEN OF JURY: We are now trying two cases together, gentlemen one of them, that of Mrs. Josephine King, against the Southern Railway Company, to recover from that company for the homicide of her husband, and to recover the full value of his life. We are also trying the case of Miss Inez King, whom being a minor, sues by her mother as her next friend. She sued for damages which she says she sustained in the same accident by which her father met his death. The two cases, as I state to you are being tried together, and the jury will find separate verdicts in each case. The number of the case of Mrs. King, for the death of her husband is No. 21, and the other case is No. 26. You can distinguish them
138 when you see them, as there are two declarations which you will have with you, and you will find separate verdicts in each case.

"Under the statutes of Georgia, gentlemen, which have been referred to, it is the duty of engineers of trains in Georgia, when approaching a crossing to blow the whistle, and as stated to you by counsel and to check and keep checking their trains as they approach the crossing, so as to be able to stop them if any person or thing should be upon the crossing. That is the statute of this state, and it is entirely clear that they were not doing that in this case, so there is no question that the railway company through its servants and agents was guilty of negligence. I therefore, instruct you as matter of law that the defendant through its servants agents and employees was guilty of negligence.

"Now, notwithstanding the negligence of the defendant railway company through its employees, if the deceased, Mr. King by the exercise of ordinary care on his part, could have avoided the consequences of defendant's negligence he, if he had simply been injured and not killed, could not have recovered against the railway company, and his widow suing for the value of his life, cannot recover in this action. Although the railroad company is guilty of negligence as I have instructed you it was, she cannot recover if Mr. King himself by the exercise of ordinary care could have avoided the consequences of that negligence."

"The burden is on the defendant to show this, and in this case the defendant company relies largely upon the evidence of Mrs. King and Miss Inez King.

"If the deceased saw the train approaching while he was still in a position of safety and before going upon the track, and he attempted to cross in front of it, under what are the undisputed facts of his case as to the proximity of the train, this would be negligence on his part without doubt, and his widow could not recover in this action.

"If by the exercise of ordinary care and prudence by the use of

his sense of hearing and of sight, the deceased could have ascertained that the train was approaching and avoid the accident, his widow cannot recover in this action for his death.

"It is the duty of persons approaching a railroad track to use their senses, and to look out for danger. A railroad track is itself a signal of danger, and persons about to go on or to cross a railroad track should exercise due care and prudence to avoid danger; and, if they fail to do so and are injured, they cannot recover, notwithstanding the fact that the railroad company through its employés is guilty of negligence.

139 "If you do not believe that the deceased was guilty of such negligence in going upon the track as would defeat a recovery under the rules I have just given you, but if you believe he was guilty of negligence in going upon the track, but did all he could to save himself after the defendant's negligence became apparent, his widow might recover, but, instead of recovering the full value of her husband's life, the sum she would otherwise recover should be reduced in proportion to the negligence attributable to the deceased; except, that, if his negligence was as great as that of the railroad, Mrs. King cannot recover at all for her husband's death. This is a rule of law called comparative negligence. If you believe the deceased was guilty of some negligence in that event, the plaintiff may recover if all was done by him that could be done to save himself and avoid injury, after the negligence of the defendant became apparent, but you would reduce the recovery which you would otherwise find, in proportion to the degree of negligence you think attributable to the deceased.

"Now, if you do not believe the deceased was guilty of any negligence, but that his conduct was that of a careful and prudent person under all the circumstances, in going upon the railroad track, then the plaintiff can recover the full value of his life.

"In the opinion of the Court, the negligence, if you believe there was negligence on the part of the deceased, the father, cannot be imputed to Miss Inez King in her suit. Her father was driving, and it was his act, of course, which put them in peril, but she would be chargeable with the decree of care her age and experience required. The rules of law I have given you on the subject would apply to her to the extent you may believe they should apply; they would be the same as to her as to her father; that is, a child or young person would reach an age when they would be accountable and governed by the same rules of negligence as an entirely grown person. It would be for you to say in view of her age and the fact that she was with her father and he driving, whether the rules of law I have given you should be applied to her. To the extent you believe they apply, they would be the same to her as to her father. Counsel have argued the question whether any negligence of her father can be imputed to her. The Court is of opinion that you cannot charge her father's negligence to her in her suit.

"If Mrs. King is entitled to recover, she is entitled to recover the full value of her husband's life, except in the event you should believe that the deceased was guilty of some negligence, which

140 I have just explained to you, but not to the extent as to defeat a recovery, when you would deduct from any sum you would otherwise find, an amount in proportion to his negligence, that is, the proportion that his negligence bears to the negligence of the defendant company.

"Some tables have been offered in evidence which you can use or not, as you see proper. They are introduced to aid you in arriving at a proper calculation. This is simply a financial matter, and there is no sentiment about it. The deceased is said to have been sixty-one or sixty-two years of age. These tables will show what his reasonable expectancy was. It is said to have been about thirteen years. Then we have the annuity table which has been worked out by actuaries, by which, if you use it, you would multiply the amount you may find his annual earning capacity after deducting any sum you think it should be reduced on account of some negligence of his, and then ascertain from these tables or otherwise, what you think the present value would be, and give Mrs. King such amount as you think would be the present value of his life. Mr. King was sixty-one or sixty-two years of age; and in doing this it would be your duty to consider the vicissitudes and exigencies of human life. At times men are sick; old age was coming on him very rapidly and his capacity of labor would grow less, and finally cease entirely. As I say, it is purely a financial matter; a matter of calculation as to what the value of the remainder of his life would be.

"If you believe that Miss King is entitled to recover, she is entitled to recover such amount as would compensate her for the injury sustained in this accident. It is a matter submitted to the enlightened conscience of impartial jurors. I can give you no rule for ascertaining her damage. Her damages should be compensatory, and you should find this amount in justice and fairness to both parties.

"If you believe she is not seriously injured, you should find accordingly. If you believe she is seriously injured, you should find in that view of the matter. It is all a matter for you to determine in fairness and justice to both parties.

"Some testimony has been offered to impeach some witness, (the two Wilsons)' by proof of previous contradictory statements. That is one of the methods of impeachment known to the law, that is, by proof of previous contradictory statements. How far this has been done in this case, and the effect it may have, is entirely a matter for the jury to determine. You have heard the evidence, and whether there was any real conflict or not, it is for you to say, and how far it tends to impeach the testimony of the Wilsons is for you.

141 "It has taken some time to try this case. I have tried to go through it carefully, and I ask for it your serious and thoughtful consideration.

"You should find a separate verdict in each case. If you do not believe either [is] entitled to recover, you should say, "We the jury find for the defendant." If you do believe either or both entitled to recover, fix the amount in each case, and say, "We the jury find for the plaintiff $—," whatever the amount may be.

"Mr. STRICKLAND: Before the jury retired, your Honor submitted to the jury the question as to whether Mr. King could have seen or

saw the approaching of danger. What I apprehend you intended to say was, 'If he saw or by the exercise of ordinary care could have seen the approach of the train."

"By the COURT: I intended to do that. I intended to give some requests of yours, and I will do so now. They are as follows, gentlemen: I further charge you that the care to be exercised by the said A. O. King, in approaching a crossing and railroad track, is that care which an ordinarily prudent person would exercise for his own safety. What would or would not amount to negligence in the manner in which a person entering upon a railroad track would depend, to a large extent upon the peculiar location of the place at which he went upon the track." That is right. It depends very largely upon all the surroundings. "An ordinarily prudent person in the possession of all his faculties should not attempt to cross a railroad track at any place without at least using his sense of sight if not that of hearing, to discover whether at the time and place he was about to cross the same, there were present any of those dangers which a person of ordinary intelligence would reasonably apprehend."

"If you believe from the evidence that the view from the direction in which the train was coming near the crossing was so concealed, that A. O. King could not see whether or not the train was approaching, then I charge you that it was his duty to act as an ordinarily prudent person would under such circumstances; and, if you believe this condition existed, and Mr. King drove on to the crossing without having stopped and listened, and, if he had listened would have heard the approach of the train in time to have avoided the injury, then I charge you that his widow cannot recover in this case."

142 "The whole thing is, if he could by the exercise of ordinary care and prudence, that is by the use of his senses of sight and hearing before his danger, could have seen the approach of the train or could have known of its approach while still in safety and could have avoided it, his widow cannot recover for his homicide."

"Of course you understand that this does not modify the rule I gave you on the question of comparative negligence.

"Mr. ARNOLD: I desire to call your Honor's attention to the fact that no negligence of the father can be imputed to the girl.

"By the COURT: Negligence of the father could not be imputed to Miss Inez King. I charge you that. I charge you, also, as I have before, that, if you believe that she had reached the age, as these gentlemen have urged, that she herself should be charged with contributory negligence, the rules I have given you on that subject will apply.

"Take the case, gentlemen."

Order was taken by consent of counsel to try the case of Inez King, by next friend, vs. So. Ry. Co., and that of Josephine King, vs. So. Ry. Co., together; said order being as follows:

"It is by consent, ordered that the two cases above stated be tried together, and that the evidence introduced shall be applicable to each case as if it had been alone upon trial, and separate verdicts in each case shall be rendered.

This April 24th, 1906. WM. T. NEWMAN,
U. S. Judge."

The jury thereupon retired to consider their verdict, and having returned into Court a verdict for the plaintiff for $3250.00, the defendant took a consent order allowing it sixty days in which to file a motion for new trial, and within the time, to-wit, on the 21st of June, 1906, moved the Court to set aside verdict and grant a new trial, which motion is as follows, to-wit:

"Verdict and judgment for plaintiff on April 27th, 1906, for $3200.00 and cost.

143 "And now comes the Southern Railway Company, defendant in the above case, within the time provided by the order granted on the day said verdict was rendered and before the final adjournment of said Court, and moves the Court to set aside said verdict and grant a new trial upon the following grounds:

1. The verdict is contrary to the evidence and without evidence to support it.

2. The verdict is contrary to law.

3. Because the Court erred in limiting the argument in the case to one and one-half hours to the side, practically four days having been consumed in putting in the evidence and two cases being tried together, being this, and that of Inez King, against the Southern Railway Company.

4. Because the charge of the Court to the jury was given during a terrific hail storm. While the Court allowed the jury to stand up as near as practicable around the Judge's bench, the noise made by the hail storm, the thunder and confusion incident thereto, was such, as movant insists that it was impossible for the jury to hear a greater part of the charge and impossible for them to have understood connectedly the instructions of the Court.

5. Because the Court erred in refusing to give in charge to the jury the following requests of defendant's counsel, made in writing and handed to the judge before the argument began, to-wit:

(1) "If you believe from the evidence in this case that at the time the husband of the plaintiff, Josephine King and the plaintiff, Inez King were injured, the railroad was guilty of negligence in that its engineer failed to check and keep checking the train from the blow post to the crossing upon which they were hurt, or in failing to blow the signal as the statute requires, or running at a reckless rate of speed, yet, after the negligence of the railway company began, if it was apparent to A. O. King, that the engineer was not checking the train, or it would have been apparent had he been in the exercise of the care of an ordinarily prudent person, and that said railroad was not in the discharge of its duties as to giving signals of the approach of a crossing, but that it was coming to the crossing at a high rate of speed, and it was in the power of the

144 said A. O. King to have avoided the danger from the negligence of the defendant by the exercise of ordinary care, then neither plaintiff in these cases can recover."

(2) "I charge you that it appearing from the evidence, that A. O. King, the husband, and his wife, Josephine King, and his minor daughter, Inez King were riding in a buggy of the said A. O. King and being driven by him, that the negligence on the part of

the said A. O. King was attributable to his daughter, Inez King, and, if under the rules I give you in charge, such negligence would have prevented the said A. O. King from recovering had he sued, the same would prevent either Josephine King or Inez King from recovering."

(3) "I further charge you, that, if you believe under the evidence in the case that the plaintiff, Josephine King and her daughter, Inez King, and her husband, A. O. King, were driving in a buggy approaching the crossing where they were injured, and, if you further believe that had they stopped and looked or listened, they would have discovered the approach of the train in time to have avoided the negligence of the defendant company in failing to check or in any other negligence being committed by it, and you further believe that they went on such crossing without having stopped and listened or looked for the approach of the train, then I charge you that neither Josephine King nor Inez King can recover in these cases."

(4) "I further charge you that the care to be exercised by the said A. O. King in approaching the crossing and railroad track is that care which an ordinarily prudent person would exercise for his own safety. What would or would not amount to negligence in the manner in which a person entered upon a railroad track would depend to a large extent upon the peculiar location of the place at which he went upon the track. An ordinarily prudent person in the possession of all his faculties would (should) not attempt to cross a railroad track at any place without at least using his sense of sight, if not that of hearing, to discover whether at the time and place he was about to cross the same, there were present any of those dangers which a person of ordinary intelligence would reasonably apprehend."

"NOTE.—The Judge gave this request in charge, except he substituted the word 'should' for the word 'would,' which as movant insists, changed the whole force of the charge.

145 (5) I further charge you that, if you believe from the evidence that if A. O. King had stopped immediately before crossing the railroad, that is, a few feet from it, and had looked, that he could have discovered the approaching train for a considerable distance and he went on the track without so looking, when, if he had looked, he could have discovered the approach of the train, or, if he had stopped and listened, could have heard its approach and thus avoided the accident, then I charge you that neither plaintiff in these cases can recover."

(6) "If you believe from the evidence that the view from the direction which the train was coming near the crossing was so concealed that A. O. King could not see whether or not the train was approaching, then I charge you an ordinarily prudent person under such circumstances would have stopped and used his sense of hearing, and, if you believe this condition existed and A. O. King drove on the crossing without having stopped and listened, and, if he had listened would have heard the approaching train in time to have avoided the injury, then I charge you neither plaintiff in these cases can recover."

(7) "If you believe from the evidence that A. O. King did dis-

cover the approaching train before driving onto the crossing and yet drove on, believing that he could cross before he was struck, then I charge you that neither plaintiff can recover."

(8) "The rules of law given you in charge as to the duty of railroads to blow and check, etc., at crossings only apply to the crossings at public roads established according to law."

(9) "Unless the evidence satisfies you that there is either an act of the legislature of Georgia or a judgment of an inferior Court or Court of Ordinary or the County Commissioners for Roads and Revenues, of Habersham County, establishing the road in question as a public road, or the evidence satisfies you that the road has been in continuous use as a public road for twenty years as it is now located, then, under the law, the road in question is not a public road such as the law contemplates when it requires the railroad to blow for the crossing. This is true, regardless of whether or not there was a blow post or crossing signal or how the railroad company itself had been treating it."

146 (10) "If you believe from the evidence that Dewberry, the engineer saw the Kings going toward the crossing but in a safe place, he had a right to presume they would not go on the track and there was no duty on the engineer to take any steps in regard to them until it was apprehended they were in danger or intended going on the track."

"6. Because the Court erred in refusing to direct a verdict when the same was moved for at the close of the evidence in the case, which was in words as follows:

"Now comes the Southern Railway Company, the defendant in each of the above cases at the close of the evidence of each, and moves the Court to direct a verdict for the defendant in each upon the following grounds:

"1. Because the evidence fails to show that this defendant was guilty of any negligence which was the proximate cause of the injury to the husband of plaintiff, Josephine King, or to the plaintiff, Inez King."

"2. The evidence fails to show that the place where plaintiffs were injured was a public crossing established as required by law and a place where this defendant, under the statute of Georgia was required to check its train.

"3. The evidence shows that the plaintiff and A. O. King, who was the husband of Josephine King, and father of Inez King, drove onto the crossing without using their sense of sight or of hearing to ascertain whether or not the train was approaching at the time and place, if they had used either the sense of sight or hearing, they would have discovered the train was approaching and was not checking for that crossing; that after they discovered or had they been in the exercise of the care of an ordinarily prudent person, would have discovered that the defendant's train would not check for the crossing in question, by the exercise of their senses they would have then avoided the consequences of defendant's negligence, if such existed.

When the entire evidence is tested by the rule laid down in Lucas, vs. Brooks, 22 Wallace, 116, to-wit, "the true rule in the case is, that,

if to the judicial mind the evidence, tested by the law of the issue and the rules of evidence is not sufficient to justify the jury fairly and reasonably in finding a verdict for plaintiff, the Court should so tell the jury," the verdict should be directed.

147 "Wherefore, it prays that the verdict be directed in its behalf."

"7. Because the verdict is excessive.

"Wherefore, it prays that a new trial be granted.

JNO. J. STRICKLAND,
Att'y for So. Ry. Co.

The foregoing motion read and considered.

The recitals of fact therein contained are true.

It appearing to the Court, that the reporter cannot prepare the brief of evidence in this case, owing to its volume and other duties on said reporter earlier than July 7th.

It is therefore ordered, that Josephine King show before me at the U. S. Court room in Atlanta, on Saturday, July 14th, at ten o'clock A. M., why a new trial should not be granted as prayed.

If for any reason the motion is not heard at the time and place herein designated, then to be heard at such other time as may be fixed by the Court. In the meantime and until further order, it is ordered that this motion and order shall act as a supersedeas to the verdict and judgment in said case. The right to amend the motion for new trial is preserved to movant until the motion is finally disposed of.

It is further ordered that plaintiff or her counsel be served with a copy of this motion and order unless the same be waived.

Let the motion be filed by the clerk.

This June 2nd, 1906.

WM. T. NEWMAN.

This motion was continued from time to time, and was finally set for the 27th of October, on which day an amendment to said motion was filed, which is in these words:

In the United States Federal Court for the Eastern Division of the Northern District of Georgia.

JOSEPHINE KING
vs.
SOUTHERN RAILWAY COMPANY.

Two suits for damage. Tried together; verdict for plaintiffs and motion for new trial.

148 By permission of the Court, the defendant in each of the above stated cases further amends its motion for new trial by adding thereto the following additional grounds:

Paragraph VIII.

Because the Court erred in striking an amendment filed by defend-

ant which is now of file, setting up that the statute of the State of Georgia requiring defendant's trains to check before reaching the crossing, contravenes the commerce clause of the Federal Statute; the same being stricken on motion of plaintiff's counsel upon the ground that the amendment did not set up a legal defense.

Paragraph IX.

Because the Court erred in ruling out the evidence of Ben Dewberry in these words:

"There are between ninety and one hundred crossings on the So. Ry. Co., between the So. Carolina line and Atlanta," which was objected to by plaintiffs, as follows:

"I object to that question and the answer, because incompetent, immaterial and inadmissible, and I think the entire case should be confined to this crossing."

When defendant's counsel stated as follows:

"I expect to prove that between the South Carolina line and Atlanta, there are practically one hundred road crossings or between eighty-five and one hundred public road crossings; that the distance is one hundred and one miles; that the crossings in some localities are very close together, and within a few hundred yards of each other, and at others further apart, but on the average making about a crossing to the mile almost. We expect to show further that to observe the statute, and check and keep checking so as to have the train under control, and to stop should any person or thing be on the crossing, it would consume from five to ten minutes for each crossing, dependent, of course, upon the weight of the train and the grade; but it would make an average of seven or eight minutes. We wish to show that this train was made up and known as No. 39, the vestibule train which runs from the City of Washington through the
States of Virginia, North Carolina, South Carolina and
149 Georgia; that it was carrrying passengers from one state to another, also carrying an express car with freight in it from one state to another. We wish and expect to show that obedience to that Crossing Act would hinder and practically prevent interstate business being done by the defendant railway. We wish to show the condition- I have just stated all existed at the time this accident occurred on the 11th of October, 1903.

By the COURT: The testimony will be excluded and you may have an exception noted to this ruling."

Paragraph X.

Because the Court erred in instructing the jury, as follows:

"Under the Statute of Georgia, gentlemen, which has been referred to, it is the duties of the engineer of trains in Georgia, when approaching a crossing to blow the whistle, as has been stated to you by counsel, to check and keep checking their trains as they approach the crossing so as to be able to stop them, if any person or thing should be upon the crossing; that is the statute of the state, and it is entirely clear, that they were not doing that in this case; so, there —

no question that the railroad company through its servants, agents and employees was guilty of negligence.

I therefore charge you as a matter of law that the defendant through its servants, agents and employees was guilty of negligence. The error being in effect, the Court instructed the jury that the statute therein mentioned was valid whether it in its operation burdened or impeded the interstate traffic of the defendant company, or impaired the usefulness of such traffic or not.

Wherefore defendant prays that these grounds be certified and new trial granted.

JNO. J. STRICKLAND AND
THOS. F. GREEN,
Att'ys for Movant.

I certify that the statements of facts of the foregoing amended motion are true.

It is ordered that the amendment be allowed as a part of the motion.

WM. T. NEWMAN,
U. S. Judge.

150 On the said motion being argued by counsel for and against the same respectively, the presiding Judge passed an order overruling the motion and refusing a new trial.

For as much as the foregoing facts and decisions do not appear of record in said case, the defendant, the Southern Railway Company, during the same term of the Court at which said cause was finally disposed of on motion for new trial and within the time allowed by law and under the rules of the Court, presents this its bill of exceptions, and prays that the same be signed, certified and filed and made a part of the record of the Court in this case.

JNO. J. STRICKLAND,
Att'y for the So. Ry. Co.

Filing: U. S. Circuit Court. Filed in clerk's office, Nov. 17th, 1906. O. C. Fuller, Clerk.

I certify that the foregoing bill of exceptions is true and contains all of the evidence and rulings and decision of the Court material to a clear understanding of the errors complained of, and the clerk of said Court is hereby ordered to file the same as a part of the record of said case.

This 17th day of November, 1906.

WM. T. NEWMAN,
U. S. Judge.

Filing: U. S. Circuit Court. Filed in clerk's office, Nov. 17th, 1906. O. C. Fuller, Clerk.

Due and legal service of the foregoing bill of exceptions acknowledged and all further service waived.

This November 17th, 1906.

REUBEN R. ARNOLD,
HOWARD THOMPSON,
Att'ys for Def't in Error.

Filing: U. S. Circuit Court. Filed in clerk's office, Nov. 17th, 1906. O. C. Fuller, Clerk.

151 *Clerk's Certificate.*

United States of America, Fifth Judicial Circuit, Eastern Division of the Northern District of Georgia.

I, Olin C. Fuller, clerk of the Circuit Court of the United States, for the Eastern Division of the Northern District of Georgia, do hereby certify that the foregoing and attached 168 pages contain a true copy of the record, bill of exceptions, assignment of errors and all the proceedings had in the cause entitled, Mrs. Josephine King, vs. Southern Railway Company, as the same appears on file and of record in the clerk's office of the said Court, except that the original writ of error and the original citation are included herein in the stead of copies.

Witness my hand officially and the seal of the said Court, this the 6th day of December, A. D. 1906.

[SEAL.] OLIN C. FULLER, *Clerk.*

152 United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Lednum, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing printed record of 151 pages, in the case of

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
against
MRS. JOSEPHINE KING, Defendant in Error,

numbered 1634, was printed under my supervision, and is identical with the printed records upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 14th day of April, A. D. 1908.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals.

153 Pleas and proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the first Monday in October, A. D. 1907, at Atlanta, Georgia, and on the third Monday in November, A. D. 1907, at New Orleans, Louisiana, before the Honorable Don A. Pardee, and the Honorable David D. Shelby, Circuit Judges, and the Honorable Waller T. Burns, District Judge.

Be It Remembered, That heretofore, to-wit: on the 11th day of January, A. D. 1907, a transcript of record, pursuant to a writ of

error to the Circuit Court of the United States for the Northern District of Georgia, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, wherein Southern Railway Company is plaintiff in error, and Mrs. Josephine King is defendant in error, which said transcript of record was filed and docketed in said Circuit Court of Appeals as No. 1634.

That thereafter the following proceedings were had in said cause in said Circuit Court of Appeals, viz:

Argument and Submission.

No. 1634.

THE SOUTHERN RAILWAY CO.
vs.
MRS. JOSEPHINE KING.

OCT. 8, 1907.

On this day this cause was regularly called, and after argument by Jno. J. Strickland, Esq., for plaintiff in error, and Harvey Hill, Esq., for defendant in error, was submitted to the Court.

And thereafter on March 3rd, 1908, an opinion of said Circuit Court of Appeals was filed in said cause in words and figures following, to-wit:

154 *Opinion.*

Filed 3 day of March, 1908.
CHARLES H. LEDNUM,
Clerk of the United States
Circuit Court of Appeals.

United States Circuit Court of Appeals, Fifth Circuit.

No. 1634.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
MRS. JOSEPHINE KING, Defendant in Error.

No. 1635.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
INEZ KING, Defendant in Error.

Writ of Error to the United States Circuit Court for the Northern District of Georgia.

Before Judges Pardee and Shelby, Circuit Judges; Burns, District Judge.

BURNS, District Judge, delivered the opinion:

These suits were brought in the Superior Court of Habersham County, State of Georgia, against the Southern Railway Company

and were removed by the latter to the United States Circuit Court.

Mrs. King sought recovery for the death of her husband, and Inez, a minor, sued by next friend for personal injuries which she had sustained.

The grounds of negligence set out in both petitions are practically the same. Mrs. King alleging that on the day of the accident, "Your petitioner, her daughter, Inez, about 14 years old and her husband A. O. King, were in a buggy drawn by a mule, traveling on a public road, and while crossing the track of said railway at what is known as the 'Wade crossing,' the vehicle was struck by the locomotive. That in the approach to said crossing the track was obscured by trees, brushes and a high bank; that the approaching train was not discovered until they were upon the track; that the speed of the train was fifty miles an hour; that the death of A. O. King and the injuries received by petitioners were due to the negligent manner in which the train was operated, the high rate of speed, and fail-
155 ure to give any warning. The petitions further aver that "the defendant's agents failed to blow the whistle at the blow-post; and failed to simultaneously check and keep checking the speed of said train as it approached said crossing, so as to stop in time, should any person or thing be crossing said track."

The defendant, the railway company, filed its answer denying each and every paragraph of plaintiff's petition and thereafter with leave of Court pleaded by amendment that at the time of the accident for many years prior thereto and now the defendant operates and controls a line of railway from the City of Washington, D. C., through the States of Virginia, North and South Carolina, into and through Georgia; that said railway forms a continuous line under the Act of Congress, for the purpose of facilitating commerce among the several States, and the postal and military communications of the United States, and to that end for the purpose of carrying passengers, freight, mails, troops and supplies from one State into another. That said train was a through train, made up in the City of Washington, carrying mail, express and passengers from one State into another, and doing an interstate business, under the authority and control of the Congress of the United States. That the statute of Georgia providing that "there must be fixed on the line of said road, at the distance of 400 yards from the center of each of said crossings and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts to blow the whistle of the locomotive until it arrives at the public crossing, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road," is inoperative as to defendant's trains, for that, it is in violation of Sec. 8, Article 1 of the Constitution of the United States, which gives to Congress the right to "regulate commerce with foreign nations and among the several States." That said statute is not a reasonable regulation of the police power, but a direct burden upon and impediment to interstate traffic and impairs the usefulness of defendant for the conduct of such business. That it is impossible to observe said statute and carry the mails under the contract which defendant has

with the Government, and the observance of said statute renders it impossible to do an interstate business.

Mrs. King about the same time, filed suit in Habersham County seeking compensation for the injuries to her person and the amount claimed as damages not being within the jurisdiction of the said Federal Court, trial was had in the Superior Court of said
156 county, resulting in a verdict for one thousand dollars. On appeal the judgment was affirmed by the Supreme Court of the State of Georgia. (See King vs. Ry. Co., Vol. 55, S. E. R., page 965; 128 Ga., p. 383.) Upon motion and agreement of counsel, an order was entered consolidating the two causes of the mother and daughter, resulting in verdicts for the plaintiffs below, from which, and the judgments thereon, assignments of error are presented for review.

The records are identical in both cases with the exception that the railway company filed in the trial Court a plea in bar, against the petition of Mrs. King upon the ground that plaintiff having recovered in the State Court for damages to her person, is now estoppel from maintaining the present action for the death of her husband. The contention is made that the injuries to the person of the wife, and the loss occasioned by the death of the husband, constitute a single cause of action and that separate actions will not lie. This contention appears to be seriously made, but in the practice and procedure of the several States it would appear to be a legal novelty without law or precedent. If it be conceded that the deceased husband was the "personal property" of the plaintiff herein, then the contention would be supported by the decisions of every State Court, but one.

Where injuries to the person and the physical property of the injured party, grow out of a single tort, then, and in that event, the tort to the person and the property constitutes a single cause of action, and as previously suggested, the same should be presented in a single suit. This is the English view and the holding is the same in all of the American Courts with one exception. The declaration that the husband is the "personal property" of the wife had not, as yet, received the sanction of Court or text writer. The rule as to a single cause of action has no application where the injury is suffered in a different capacity, or by different persons. In such cases there is, of necessity, two causes of action and when embraced in a single suit, a plea of misjoinder would be applicable. Damages recovered by the surviving wife for injuries to her person became her separate property. Whereas in many States, and especially in Georgia, the recovery for the death of the husband becomes a trust fund for the benefit of the heirs of the deceased.

It follows, that the error complained of, by reason of the Court overruling said plea, is without merit. Any other disposition would have been error.

The following instruction is assigned as error:

157 "I further charge you that the care to be exercised by the said A. O. King in approaching the crossing and railroad track is that care which an ordinarily prudent person would exercise

for his own safety. What would, or would not, amount to negligence in the manner upon which a person entered upon a railroad track, would depend, to a large extent, upon the peculiar location of the place at which he went upon the track. An ordinarily prudent person in the possession of all his faculties would not attempt to cross a railroad track at any place without using at least his sense of sight, if not that of hearing, to determine whether, at the time and place he was about to cross the same, there were present any of those dangers which a person of ordinary intelligence would reasonably apprehend."

This charge was given at the request of the defendant, with this exception, that the Judge substituted the word "should" for "would" where it occurs in the last paragraph of the charge and plaintiff in error contends that it changed the whole force of the charge. This assignment can not be sustained. Instructing the jury that the care required is such that an ordinarily prudent person " 'would' exercise" is equivalent to saying " 'should' exercise" import the words would and should import the same meaning, and the best authorities use them interchangeably.

Blythe vs. Birmingham Water Works, 11 Exch. 781.
Words & Phrases, Vol. 8, page 1527.

The action of the trial Court in sustaining a demurrer to so much of defendant's answer, setting up, by amendment, the statute of Georgia governing trains in approaching a public road crossing, known as "the blow post and checking act," is assigned as error and particularly the ruling as to the second clause thereof which requires the engineer to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road." This legislative act appears in the statement and is known as Section 2222 of the Civil Code (1895) and was formerly Section 708 Civil Code (1882).

The brief and argument of the plaintiff in error largely rests the disposition to be made here upon this assignment. An examination of the act complained against, and its construction by the
158 Courts of Georgia, will relieve it from the suggestion that it was enacted for the purpose of regulating interstate commerce.

This statute was passed January 22nd, 1852 (Acts. 1852, p. 8), and became effective on the first of February thereafter. The original act provided that blow-posts should be erected at a distance of 200 yards from each public road crossing and a sign at the crossing in large letters with the warning: "When you hear the whistle blow look out for the engine." As amended, the distance of the blow-post is 400 yards and the warning sign has been eliminated. This enactment resulted from an accident to Mrs. Winn, her children and driver, which occurred at a public road crossing on the line of the Macon & Western Railway on December 14th, 1851, resulting in the death of two of the children and the driver, and serious injuries to Mrs. Winn and one child, the limbs of the former being broken and the skull of the latter fractured. The catastrophe was of such a serious nature that the General Assembly, then in session, promptly

passed the act above referred to. This accident was the foundation of the cases of Davis and Winn, reported in 18 Ga. 679; 19 Ga. 440; 26 Ga. 250.

It being conceded, or rather found as a fact by this Court, that the legislative intent was to protect travelers and others in the use of the public highways of Georgia and not to regulate interstate traffic, it is still permissible, and ordinarily a matter of duty, to inquire what effect the statute has upon trains engaged in interstate commerce, for the reason that the intent may be waived, or dismissed, and still the Courts are not relieved from the necessity of ascertaining the practical effect of a particular act, for if it be conceded that the Legislature of a State is inhibited from passing any law which has the effect of regulating that which was directly committed to the Nation in the adoption of the Constitution, it follows, that duty would not be performed, short of the declaration, that such legislation is beyond the scope and power of the State. The authorities supporting this proposition, may be found in Gibbons vs. Ogden, 9 Wh., p. 1, decided as early as 1824, the opinion being by Chief Justice Marshall, and in all subsequent cases where the question was at issue and particularly the case of Hennington vs. Georgia, 163 U. S. 299, where the earlier decisions are reviewed. If the act under discussion is but the reasonable exercise of the police power of the State, though it may effect and tend, in a measure, to regulate interstate commerce, it would not be obnoxious, nor a subject for inquiry by this Court, until such
159 time as the Congress may enact legislation covering this particular question. It appears to have been passed for the sole purpose of protecting those who may use public highways and presumably has its classification under the police power relating to the public safety. It may be contended however that the safety of the public is so remotely involved that the effect of the enactment is unreasonable and places an undue burden upon the carrier. While this Act in regard to its effect upon interstate commerce has never been presented to the Supreme Court of Georgia, as appears from an examination of the reports of that State from Vols. 18 to 128, the statute has frequently been construed in regard to local action and uniformly upheld, though the Supreme Court of that State has seen proper to subject it to criticism.

In affirming the judgment in Central of Georgia Railway Company vs. Hall, 34 S. E. 605, the Supreme Court makes the following observations concerning Section 2222 of the Georgia Code:

"We agree with the learned counsel that this law which requires trains to check, and keep checking when approaching crossings is a hard one, and that it is impossible for the railroads of the country to transact the business of the country and obey it. It was passed about 50 years ago, before the people appreciated the necessity of rapid transit in travel and in freight. If the law was duly obeyed by the locomotive engineers, I am informed that it would take 12 hours or more to run a passenger train from Atlanta to Macon, a distance of about 100 miles; still it is the law of the land and the Courts must enforce it, however hard it may work upon the business interests of the country, if it should be observed, or upon the railroads when they violated it."

Where the servants of the railroad company fail to observe it and any person or property is injured upon the crossing, the company can make no defense, except that the injury was done by the consent of the person injured, or that he could have avoided the injury by the observance of ordinary care, or that his negligence contributed to it — the way of mitigation of damages."

In Bowen vs. Gainesville, etc., Ry. Co., 22 S. E., p. 695, Mch. 25, 1895, the Supreme Court referring to the requirement to check, say, "that requirement has frequently been construed to mean must have his train under such control, that he can bring it to a complete
160 stop, if necessary, to prevent a collision upon the track itself, and should it be strictly obeyed, a collision of any sort would be rendered impossible and there would be no necessity whatever for any warning of the approach of the train by the blowing of the whistle."

The question of the validity of State statutes and orders of State Railroad Commissions directing the stoppage of through interstate trains have frequently, within late years, been before the Supreme Court of the United States. One of the recent cases is that of Mississippi Railroad Commission vs. Illinois Central, 203 U. S. 335, and Atlantic Coast Line Railroad vs. North Carolina Commission, 206 U. S. 1. The last declaration by the Supreme Court is found in the opinion rendered Dec. 9, 1907, in Atlantic Coast Line Railroad vs. South Carolina Commission, in which Mr. Justice Peckham speaking for that tribunal uses the following language:

"That any exercise of State authority in whatever form manifested, which directly regulates interstate commerce is repugnant to the commerce clause of the Constitution, is obvious. It hence arises that any command of a State, whether made directly or through the instrumentality of a railroad commission, which orders, or the necessary effect of which is to order, the stopping of an interstate train at a named station or stations, if it directly regulates interstate commerce, is void."

In Gladson vs. Minnesota, 166 U. S. 430, it was said:

"The principles of law which govern this case are familiar, and have been often affirmed by this Court. A railroad corporation created by a State is for all purposes of local government a domestic corporation and its railroad within the State is a matter of domestic concern. Even when its road connects, as most railroads do, with railroads in other States, the State which created the corporation may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. It may prescribe the location and the plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience and comfort of the passengers and of the public. All such regulations are strictly within the
161 police power of the State. They are not in themselves regulations of interstate commerce; and it is only when they operate as such in the circumstances of their application, and conflict with the express or presumed will of Congress exerted upon the same sub-

ject, that they can be required to give way to the paramount authority of the Constitution of the United States. Stone vs. Farmers, Loan & Trust Co., 116 U. S. 307, 333, 334; Smith vs. Alabama, 124 U. S. 465, 481, 482; Hennington vs. Georgia, 163 U. S. 299, 308, 317; New York, New Haven & Hartford Railroad vs. New York, 165 U. S. 628, 632."

The majority of the Court are of opinion that Gladson vs. Minnesota, supra, and authorities therein cited, sustain the constitutionality of the statute; that the same is a valid exercise of the police power of the State, and, therefore, the trial Court did not err in sustaining the demurrer to the amended answer.

The writer entertains the view that the statute is valid in so far as domestic corporations are concerned; but unreasonable and void as to trains engaged in interstate commerce.

The business of the country must go on and in the language of the Supreme Court of Georgia, in Central Railway vs. Hall, supra, "It is impossible for the railroads to transact the business of the country and obey it."

Any exercise of State authority in whatever form manifested, which directly regulates, or the necessary effect of which is to regulate interstate commerce is void. Atlantic, etc., Ry. vs. South Carolina, supra.

Plaintiff in error excepted to the ruling of the Court in excluding the testimony of Ben Dewberry, in charge of the engine at the time of the collision, in that said witness being called to testify in behalf of the defendant below, in response to a question from counsel, answered: "There are between 90 and 100 crossings on the Southern Railway between the South Carolina line and Atlanta." The question was objected to because incompetent, immaterial and inadmissible with the observation by counsel: "I think the entire case should be confined to this crossing." Counsel for defendant stated, "I expect to prove that between the South Carolina line and Atlanta, there are practically 100 road crossings, or between 85 and 100 public road crossings; that the distance is 101 miles; that the crossings in some localities are very close together, and within a few hundred yards of each other, and at others further apart; the average making about a crossing to the mile almost;" we expect to show further, that
162 to observe the statute, and check and keep checking, so as to have the train under control, and to stop, should any person or thing be on the crossing, would consume from 5 to 10 minutes at each crossing, depending upon the weight and length of train and grade. We wish to show that this train was made up and known as No. 39 vestibule train, which runs from the City of Washington through the States of Virginia, North and South Carolina and Georgia; that it was carrying passengers from one State to another, and also carried an express car with freight. We expect to show that obedience to that crossing Act would hinder and practically prevent interstate business being done by the defendant." The objection was sustained, testimony excluded, and exception noted. We are of the opinion that there was no error in the action of the Court in sustaining the objection, as the testimony was not properly admissible in the absence of pleading to support it. This view seems to have obtained

with counsel for defendant below, as evidenced by the amendment filed and heretofore discussed.

Pleadings of the parties are the allegations made by the parties to a civil, or criminal, case for the purpose of definitely fixing and presenting the issues to be tried and determined between them; and the facts from which the law draws the conclusion of non-liability, must be pleaded in the answer, where they are not stated in the petition.

Under Section 914 of the Revised Statutes of the United States, it is provided that the practice, pleadings, forms and modes of proceeding in civil causes, other than equity and admiralty, in the Circuit and District Courts shall conform, as near as may be, to the practice, pleadings, forms and modes of proceeding existing in like causes in the Courts of record of the State in which such Circuit and District Courts are held.

The only object, and the avowed purpose of tendering this testimony, was to show the invalidity of the statute in so far as it related to trains engaged in interstate traffic, and this without special plea, would not be permissible under the practice and pleadings obtaining in Georgia. See Parham & Co. vs. Potts-Thompson Liquor Co., 56 S. E. 460, and cases there cited.

The validity, or invalidity of a statute, can not be considered upon appeal, unless the record shows that the question was distinctly raised in the pleadings in the Court below.

Savannah, etc., Ry. Co. vs. Hardin, 35 S. E. 68-L.

163 A subsequent assignment complains of the refusal to direct a verdict for the defendant. The evidence was sharply in conflict and the charge requested would have invaded the province of the jury.

The last assignment seeks to review the following paragraph of the general charge to the jury:

"Under the statutes of Georgia, gentlemen, which have been referred to, it is the duty of engineers of trains in Georgia when approaching a crossing, to blow the whistle, as stated to you by counsel, and to check, and keep checking their trains as they approach the crossing, so as to be able to stop them if any person or thing should be upon the crossing. That is the statute of this State, and it is entirely clear that they were not doing that in this case; so there is no question that the railway company, through its servants and agents, was guilty of negligence. I, therefore, instruct you as a matter of law, that the defendant through its servants, agents and employees was guilty of negligence."

This point is reserved, but the brief contains neither authority nor argument in support of the proposition. The failure to comply with a State statute is held to be negligence per se in Georgia and many other jurisdictions. The engineer testified that he sounded the whistle at the blow-post, 400 yards from the crossing, but did not continue to blow until the crossing was reached, and made "no effort to comply with the statute in any other particular," and only attempted to check his train when he realized the danger of collision. The object of blowing the whistle is to give timely warning of the approach of the train. It follows that, if a person about to go upon the

crossing, sees, hears, or otherwise knows of the approach of the train in time to avoid injury, the object of the statute has been accomplished, and in that event failure to give the statutory warning would not be negligence. This view occurred to the trial Court, and the record discloses that upon this point the jury was charged:

"If by the exercise of ordinary care and prudence the deceased could have ascertained by the use of his sense of hearing, and of sight, that the train was approaching, and thereby avoided the accident, his widow can not recover in this action."

And further:

164 "If you believe that King drove on the crossing without having stopped and listened, and if he had listened he would have heard the approach of the train in time to have avoided the injury, then, I charge you that his widow cannot recover."

If the charge is error, which we do not concede, it is rendered harmless by the further charge, to-wit:

"Notwithstanding the negligence of the defendant (in failing to comply with the statute) if the deceased, by the exercise of ordinary care could have avoided the consequences of defendant's negligence, his widow can not recover."

The same rule was applied to the daughter, with the exception that the negligence of the father, if any, could not be attributed to her.

Upon the whole case, as made by the pleadings and testimony, the law was clearly presented, the assignments disclose no error, and the judgments should be in all things affirmed.

And thereafter on the 3rd day of March, 1908, in the record of the proceedings of said Circuit Court of Appeals is a judgment in said cause in the words and figures following, to-wit:

Final Judgment.

No. 1634.

SOUTHERN RAILWAY COMPANY
vs.
MRS. JOSEPHINE KING.

M'CH 3, 1908.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of Georgia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the plaintiff in error, Southern Railway Company, and the surety on the writ of error bond herein, J. W. English, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of said Circuit Court.

165 I, Charles H. Lednum, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the 12 pages next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the Court (except the transcript of the record from the Circuit Court of the United States for the Northern District of Georgia) in a certain cause in said Court, numbered 1634, wherein Southern Railway Company *in* plaintiff in error, and Mrs. Josephine King is defendant in error, as full, true and complete as the originals of the same now remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 14th day of April, A. D. 1908.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals.

166 In the United States Circuit Court of Appeals for the Fifth Circuit.

THE SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
versus
Mrs. JOSEPHINE KING, Defendant in Error.

It is hereby stipulated by and between the plaintiff in error and defendant in error, that the certified transcript of the record of the proceedings in the United States Circuit Court of Appeals for the Fifth Circuit, filed in the Supreme Court of the United States by petitioner at the time of the filing of its petition for a writ of certiorari, may be taken as a return to the writ of certiorari issued out of the Supreme Court in said cause and the filing of a further certified transcript is hereby waived.

JNO. J. STRICKLAND,
Attorney for Plaintiff in Error.
REUBEN R. ARNOLD,
Attorney for Defendant in Error.

Endorsements: No. 1634. Southern Railway Company vs. Mrs. Josephine King. Stipulation as to return to certiorari. U. S. Circuit Court of Appeals, Filed Jul- 20, 1908. Charles H. Lednum, Clerk.

A true copy.

Attest with seal this 20th day of July, 1908.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM, *Clerk.*

167 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Southern Railway Company is plaintiff in error, and Mrs. Josephine King is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the Northern District of Georgia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Su-

168 preme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of May, in the year of our Lord one thousand nine hundred and eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

169 [Endorsed:] 365/21139. File No. 21,139. Supreme Court of the United States. No. 736, October Term, 1907. Southern Railway Company, vs. Mrs. Josephine King. Writ of Certiorari. Filed 20 day of July, 1908. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

In the United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Lednum, Clerk of said Court, do hereby certify that I received the within writ on the 20th day of July, A. D. 1908, and whereas, the attorneys for the parties therein named have, by a stipulation in writing filed in my office on this day, agreed that the certified transcript of the record of the proceedings in the United States Circuit Court of Appeals filed in the Supreme Court of the United States, by petitioner, at the time of the filing of its petition for certiorari, can be taken as a return to the writ of certiorari issued by the Supreme Court, and the filing of a further certified transcript is hereby waived. Therefore, in compliance with said writ, and by direction of the Judges of this court, I have made and attached hereto a certified copy of said stipulation as a return to the within writ.

Witness my official signature and the seal of said Court this the 20th day of July, A. D. 1908.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM, *Clerk.*

170 [Endorsed:] File No. 21,139. Supreme Court U. S. October Term, 1909. Term No. 140. Southern Railway Co., Petitioner, vs. Mrs. Josephine King. Writ of certiorari & return. Filed July 23d, 1908.

PETITION FOR CERTIORARI.

IN THE SUPREME COURT OF THE UNITED STATES.

SOUTHERN RAILWAY COMPANY,
Petitioner,
vs.
JOSEPHINE KING,
Respondent.

To the HONORABLE The CHIEF JUSTICE and ASSOCIATE JUSTICES of THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner the SOUTHERN RAILWAY COMPA, NY, respectfully represents that JOSEPHINE KING brought her suit in Habersham Superior Court in the State of Georgia against your petitioner the SOUTHERN RAILWAY COMPANY, for the alleged homicide of her husband, at a public crossing. Said case was regularly removed into the United States Circuit Court for the Eastern Division of the Northern District of Georgia. In addition to the general answer filed, your petitioner filed an amended answer under the order of the Court in words as follows:

"Now comes the Southern Railway Company, the defendant in the above stated case, and by permission of the Court first obtained, amends its answer already filed, and says plaintiff should not recover in this case, for the following additional reasons:

PARAGRAPH XI.

At the time plaintiff alleges she was injured and for many years prior thereto, and now, defendant controls and operates a line of railroad from the City of Washington, D. C., through

the States of Virgnia, North Carolina, South Carolina, and into and through Georgia; said line forming a continuous line of railroad, the same having been formed under the Act of Congress, for the purpose of facilitating commerce among the several states, and the postal and military communications of the United States, and to that end for the purpose of carrying passengers, freight, government mails, troops and supplies from one state into another.

PARAGRAPH XII.

Defendant further shows that the train which plaintiff alleges injured her was a through train made up in the City of Washington, D. C., carrying U. S. Mail, and an express car of merchandise, and passenger coaches with passengers going from one state into another; and this defendant by said train was doing an inter-state business, under the authority and control of the Congress of the United States.

PARAGRAPH XIII.

Defendant further shows that the statute of Georgia, which is in these words, to-wit:

"There must be fixed on the line of said road, at the distance of 400 yards from the center of each of said crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof so as to stop in time should any person or thing be crossing said track on said road," the violation of which plaintiff alleges as the negligence in this case is and was inopperative as to defendant's train, which plaintiff alleges injured her, for the

reason that it is in violation of Section 8, Article First, of the Constitution of the U. S., which gives to Congress the right to "regulate commerce with foreign nations, and among the several states and with the Indian Tribes."

PARAGRAPH XIV.

Your defendant further shows that the Statute of Georgia is not a reasonable regulation of the police power of the state to secure the safety of persons, but that the statute is a direct burden on and impedes the inter-state traffic being done by this defendant, and impairs the usefulness of its facilities for such traffic.

PARAGRAPH XV.

Defendant further shows that it is impossible to observe said statute and carry the mails as defendant is required to carry them under the contract it has with the government; and it is likewise impossible to do an inter-state business, and at the same time comply with the terms of said statute.

Wherefore, it says that said statute is inoperative as to it, and it should not be required to comply with the same on its inter-state line of railroad.

All which it stands ready to verify and prays that it be hence discharged with its reasonable cost."

The plaintiff below demurred to this amendment upon the ground that the same did not set up a defense good in law. After argument the Hon. W. T. NEWMAN, Judge, presiding, sustained the demurrer and struck the amendment. The case then went to trial.

During the progress of the case Ben Dewberry, an Engineer of the Company was a witness on the stand and the following occurred:

"BEN DEWBERRY, stated that:

'There are between ninety and one-hundred crossings on the Southern Railway, between the South Carolina line and Atlanta."

"Plaintiff's counsel said:

'I object to that question and to the answer, because incompetent, immaterial and inadmissible. I think the entire case should be confined to this crossing.'

"Counsel for defendant then stated:

'I expect to prove that between the South Carolina line and Atlanta, there are practically one-hundred road crossings, or between eighty-five and one-hundred public road crossings; that the distance is one-hundred and one miles; that the crossings in some localities are very close together, and within a few hundred yards of each other, and at others farther apart, but on the average making a crossing to the mile almost. We expect to show further, that to observe the statute and check and keep checking so as to have a train under control, and to stop should any person or thing be on the crossing it would consume from five to ten minutes for each crossing dependent, of course, upon the weight and length of the train, and the grade; but it would make an average of seven or eight minutes. We wish to show that this train was made up and known as No. 39, the vestibule train which runs from the City of Washington, through the States of Virginia, North Carolina, South Carolina and Georgia; that it was carrying passengers from one state to another, also carrying an express car with freight on it, from one state to another. We wish and expect to show that obedience to that Crossing Act would hinder, and

practically prevent inter-state business being done by the defendant railroad. We wish to show the condition I have just stated all existed at the time this accident occurred, on the 11th of October, 1903.'"

"By the Court:

'The testimony will be excluded, and you may have an exception noted to this ruling.'"

A verdict was rendered for the plaintiff below. Motion for New Trial was made and overruled, and the case then carried to the United States Circuit Court of Appeals, being No. 1635 of the Fifth Circuit.

On the 3d day of March, 1908, the United States Circuit Court of Appeals handed down an opinion affirming the judgment of the Court below; all of the Justices of said Court agreeing upon all the propositions in the case, except the demurrer to the amended answer above set forth, and as to this proposition two of the Justices only assenting to the opinion, the other expressing a different view. A copy of said opinion as rendered is as follows:

UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH CIRCUIT.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error. vs. MRS. JOSEPHINE KING, Defendant in Error.	No. 1634.
SOUTHERN RAILWAY COMPANY, Plaintiff in Error. vs. INEZ KING, Defendant in Error	No. 1635.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

Before Judges Pardee and Shelby, Circuit Judge, Burns, District Judge. Burns, District Judge delivered the opinion.

These suits were brought in the Superior Court of Habersham County, State of Georgia against the Southern Railway Company and were removed by the latter to the United States Circuit Court.

Mrs. King sought recovery for the death of her husband, and Inez, a minor, sued by next friend for personal injuries which she had sustained.

The grounds of negligence set out in both petitions are practically the same. Mrs. King alleging that on the day of the accident, "Your petitioner, her daughter, Inez, about 14 years old and her husband A. O. King, were in a buggy drawn by a mule, traveling on a public road, and while crossing the track of said railway at what is known as the 'Wade crossing' the vehicle was struck by the locomotive. That in the ap-

proach to said crossing the track was obscured by trees, brushes and a high bank; that the approaching train was not discovered until they were upon the track; that the speed of the train was fifty miles an hour; that the death of A. O. King and the injuries received by petitioners were due to the negligent manner in which the train was operated, the high rate of speed and failure to give any warning. The petitions further aver that "the defendants' agent failed to blow the whistle at the blow-post; and failed to simultaneously check and keep checking the speed of said train as it approached said crossing, so as to stop in time, should any person or thing be crossing said track."

The defendant, the Railway Company filed its answer denying each and every paragraph of plaintiff's petition and thereafter with leave of court pleaded by amendment that at the time of the accident for many years prior thereto and now the defendant operates and controls a line of railway from the City of Washington, D. C., through the States of Virginia, North and South Carolina, into and through Georgia; that said railway forms a continuous line under the Act of Congress, for the purpose of facilitating commerce among the several States, and the postal and military communications of the United States, and to that end for the purpose of carrying passengers, freight, mails, troops and supplies from one State into another. That said train was a through train made up in the City of Washington, carrying mail, express and passengers from one State into another, and doing an inter-state business, under the authority and control of the Congress of the United States. That the Statue of Georgia, providing that "there must

be fixed on the line of said road, at the distance of 400 yards from the center of each of said crosings and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts to blow the whistle of the locomotive until it arrives at the public crossing, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road," is inoperative as to defendants trains, for that, it is in violation of Sec. 8, Article 1 of the Constitution of the United States, which gives to congress the right to "regulate commerce with foreign nations and among the several States." That said statute is not a reasonable regulation of the police power, but a direct burden upon and impediment to inter-state traffic and impairs the usefulness of defendant for the conduct of such business. That it is impossible to observe said statute and carry the mails under the contract which defendant has with the Government, and the observance of said statute renders it impossible to do an inter-state business.

Mrs. King about the same time, filed suit in Habersham County seeking compensation for the injuries to her person and the amount claimed as damages not being within the purisdiction of the said Federal Court, trial was had in the Superior Court of said County, resulting in a verdict for one thousand dollars. On appeal the judgment was affirmed by the Supreme Court of the State of Georgia. (See King vs. Ry. Co., Vol. 55 R. R. page 965: 128 Ga. p. 383. Upon motion and agree ment of counsel, an order was entered consolidating the two causes of the mother and daughter, resulting in verdicts for the plaintiffs below, from which, and the judgments thereon, assignments of error are presented for review.

The records are identicl in both cases with the exception that the Railway Company filed in the trial court a plea in bar, against the petition of Mrs. King upon the ground that plaintiff having recovered in the State court for damages to her person, is now estopped from maintaining the present action for the death of her husband. The contention is made that the injuries to the person of the wife, and the loss occasioned by the death of the husband, constitute a single cause of action and that separate actions will not lie. This contention appears to be seriously made but in the practice and procedure of the several State it would appear to be a legal novelty without law or precedent. If it be conceded that the deceasd husband was the "person property"' of the plaintiff herein, then the contention would be supported by the decisions of every State court, but one.

Where injuries to the person and the physical property of the injured party, grow out of a single tort, then, and in that event, the tort to the person and the property constitutes a single cause of action, and as previously suggested, the same should be presented in a single suit. This is the English view and the holding is the same in all the American Courts with one exception. The declaration that the husband is the "personal property" of the wife had not, as yet, received the sanction of court or text writer. The rule as to a single cause of action has no application where the injury is suffered in a different capacity, or by different persons. In such cases there is, of necessity, two causes of action and when embraced in a a single suit, a plea of misjoinder would be applicable. Damages recovered by the surviving wife for injuries to her person be-

came her separate property. Whereas in many States, and especially in Georgia, the recovery for the death of the husband becomes a trust fund for the benefit of the heirs of the deceased.

It follows, that the error complained of, by reason of the court overruling said plea, is without merit. Any other disposition would have been error.

The following instruction is assigned as error:

"I further charge you that the care to be exercised by the said A. O. King in approaching the crossing and railroad track is that care which an ordinarily prudent person would exercise for his own safety. What would, or would not, amount to negligence in the manner upon which a person entered upon a railroad track, would depend, to a large extent, upon the peculiar location of the place at which he went upon the track. An ordinarily prudent person in the possession of all his faculties would not attempt to cross a railroad track at any place without using at least his sense of sight; if not that of hearing, to determine whether, at the time and place he was about to cross the same, there were present any of those dangers which a person of ordinary intelligence would reasonably apprehend."

This charge was given at the request of the defendant, with this exception, that the judge substituted the word "should" for "would" where it occurs in the last paragraph of the charge and plaintiff in error contends that it changed the whole force of the charge. This assignment can not be sustained. Instructing the Jury that the care required is such that an ordinarily prudent person "would" exercise" is equivalent to saying "should exercise" the words would and should import the same meaning, and the best authorities use them interchangeably.

Blythe vs. Birmingham Water Works, 11 Exch. 781
Words & Phrases, Vol. 8, page 1527.

The action of the trial court in sustaining a demurrer to so much of defendant's answer, setting up, by amendment, the Statute of Georgia governing trains in approaching a public road crossing, known as "the blow-post and checking act," is assigned as error and particularly the ruling as to the second clause thereof which requires the Engineer to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road." This legislative act appears in the statement and is known as section 2222 of the Civil Code (1895), and was formerly section 708 Civil Code (1882).

The brief and argument of the plaintiff in error largely rests the disposition to be made here upon this assignment. An examination of the act complained against, and its construction by the courts of Georgia, will relieve it from the suggestion that it was enacted for the purpose of regulating interstate commerce.

This statute was passed January 22nd, 1852 (Acts 1852, p. 8) and became effective on the first of February thereafter. The original act provided that blow-posts should be erected at a distance of 200 yards from each public road crossing and a sign at the crossing in large letters with the warning: "when you hear the whistle blow look out for the engine." As amended, the distance of the blow-post is 400 yards and the warning sign has been eliminated. This enactment resulted from an accident to Mrs. Winn, her children and driver, which occurred at a public road crossing on the line of the Macon & Western Railway on December 14th, 1851, resulting in the death of two of the children and the driver, and serious in-

juries to Mrs. Winn and one child, the limbs of the former being broken and the skull of the latter fractured. The catastrophe was of such a serious nature, that the General Assembly, then in session, promptly passed the act above referred to. This accident was the foundation of the cases of Davis and Winn, reported in 18 Ga. 679; 19 Ga. 440; 26 Ga. 250.

It being conceded, or rather found as a fact by this court, that the legislative intent was to protect travelers and others in the use of the public highways of Georgia and not to regulate inter-state traffic, it is still permissible, and ordinarily a matter of duty, to inquire what effect the statute has upon trains engaged in inter-state commerce, for the reason that the intent may be waived, or dismissed, and still the courts are not relieved from the necessity of ascertaining the practical effect of a particular act, for if it be conceded that the Legislature of a state is inhibited from passing any law which has the effect of regulating that which was directly committed to the Nation in the adoption of the Constitution, it follows, that duty would not be performed, short of the declaration, that such legislaion is beyond the scope and power of the State. The authorities supporting this proposition, may be found in Gibbons v. Ogden, 9 Wh. p. 1., decided as early as 1824, the opinion being by Chief Justice Marshall, and in all subsequent cases where the question was at issue and particularly the case of Hennington vs. Georgia 163 U. S. 299, where the earlier decisions are reviewed. If the act under discussion is but the reasonable exercise of the police power of the State, though it may effect and tend, in a measure, to regulate inter-state commerce, it would not be obnoxious nor a subject for inquiry by

this court, until such time as the Congress may enact legislation covering this particular question. It appears to have been passed for the sole purpose of protecting those who may use public highways and presumably has its classification under the police power relating to the public safety. It may be contended, however, that the safety of the public is so remotely involved that the effect of the enactment is unreasonable and places an undue budren upon the carrier. While this Act in regard to its effect upon inter-state commerce has never been presented to the Supreme Court of Georgia, as appears from an examination of the reports of that State from Vols. 18 to 128, the statute has frequently been construed in regard to local action, and uniformly uheld, though the Supreme Court of that State has seen proper to subject it to criticism.

In affirming the judgment in Central of Georgia Railway Company vs. Hall, 34 S. E. 605, the Supreme Court makes the following observations concerning section 2222 of the Georgia Code:

"We agree with the learned counsel that this law which requires trains to check, and keep checking when approaching crossing is a hard one, and that it is impossible for the railroads of the country to transact the business of the country and obey it. It was passed about 50 years ago, before the people appreciated the necessity of rapid transit in travel and in freight. If the law was duly obeyed by the locomotive engineers, I am informed that it would take 12 hours or more to run a passenger train from Atlanta to Macon, a distance of about 100 miles; still it is the law of the land and the courts must enforce it, however, hard it may work upon the business interests of the country, if it should be observed, or upon the railroads when they violated it."

Where the servants of the railroad company fail to observe it and any person or property is injured upon the crossing, the company can make no defense, except that the injury was

done by the consent of the person injured, or that he could have avoided the injury by the observance of ordinary care, or that his negligence contributed to it in the way of mitigation of damages."

In Bowen vs. Gainesville et. Ry. Co. 22 S. E. p. 695, Mch. 25, 1895, the Supreme Court referring to the requirement to check, says that requirement has frequently been construed to mean must have his train under such control, that he can bring it to a complete stop, if necessary, to prevent a collision upon the track itself, and should it be strictly obeyed, a collision of any sort would be rendered impossible and there would be no necessity whatever for any warning of the approach of the train by the blowing of the whistle."

The question of the validity of State Statutes and orders of State railroad Commissions directing the stoppage of through inter-state trains have frequently, within late years, been before the Supreme Court of the United States. One of the recent cases is that of Mississippi Railroad Commission vs. Illinois Central 203 U. S. 335, and Atlantic Coast Line Railroad vs. North Carolina Commission, 206 U. S. 1. The last declaration by the Supreme Court is found in the opinion rendered Dec. 9, 1907 in Atlantic Coast Line Railroad vs. South Carolina Commission, in which Mr. Justice Peckham, speaking for that tribunal uses the following language:

"That any exercise of State authority in whatever form manifested, which directly regulates inter-state commerce is repugnant to the commerce clause of the Constitution, is obvious. It hence arises that any command of a State, whether made directly or through the instrumentality of a railroad com-

mission, which orders, or the necessary effect of which is to order, the stopping of an inter-state train at a named station or stations, if it directly regulates interstate commerce, is void."

In Gladson v. Minnesota, 166 U. S. 430, it was said:

"The principles of law which govern this case are familiar, and have been often affirmed by this court. A railroad corporation created by a State is for all purposes of local government a domestic corporation and its railroad within the State is a matter of domestic concern. Even when its road connects as most railroads do, with railroads in other States, the Staate which created the corporation may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. It may prescribe the location and the plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience and comfort of the passengers and of the public. All such regulations are strictly within the police power of the State. They are not in themselves regulations of inter-state commerce; and it is only when they operate as such in the circumstances of their application, and conflict with the express or presumed will of Congress exerted upon the same authority of the Constitution of the United States. Stone v. Farmers' Loan & Trust Co. 116 U. S. 307, 333, 334; Smith v. Alabama, 124 U. S. 465, 481, 482; Hennington v. Georgia, 163, U. S., 299, 308, 317; New York, New Haven & Hartford Railroad v. New York, 165 U. S. 628, 632."

The majority of the court are of opinion that Gladson v. Minnesota, supra, and authorities therein cited, sustain the constitutionality of the Statute; that the same is a valid exercise of the police power of the State, and therefore, the trial court did not err in sustaining the demurrer to the amended answer.

The writer entertains the view that the Statute is valid in so far as domestic corporations are concerned; but unreasonable and void as to trains engaged in inter-state commerce.

The business of the country must go on and in the language of the Supreme Court of Georgia, in Central Railway v. Hall,

supra, "it is impossible for the railroads to transact the business of the country and obey it."

Any exercise of State authority in whatever form manifested, which directly regulates, or the necessary effect of which is to regulate interstate commerce is void. Atlantic, etc. Ry. v. South Carolina, supra.

Plaintiff in error excepted to the ruling of the court in excluding the testimony of Ben Dewberry, in charge of the engine at the time of the collision, in that said witness being called to testify in behalf of the defendant below, in response to a question from counsel, answered: "There are between 90 and 100 crossings on the Southern Railway between the South Carolina line and Atlanta." The question was objected to because incompetent, immaterial and inadmissible with the observation by counsel: "I think the entire case should be confined to this crossing." Counsel for defendant stated, "I expect to prove that between the South Carolina line and Atlanta, there are practically 100 road crossings, or between 85 and 100 public road crossings; that the distanc is 101 miles; that the crossings in some localities are very close together, and within a few hundred yards of each other, and of others further apart; the average making about a crossing to the mile almost"; we expect to show further, that to observe the statute, and check and keep checking, so as to have the train under control, and to stop, should any person or thing be on the crossing, would consume from 5 to 10 minutes at each crossing, depending upon the weight and length of train and grade. We wish to show that this train was made up and known as No. 39 vestibule train, which runs from the City of Washington through

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the States of Virginia, North and South Carolina and Georgia; that it was carrying passengers from one State to another, and also carried an express car with freight. We expect to show that obedience to that crossing Act would hinder and practically prevent inter-state business being done by the defendant." The objection was sustained, testimony excluded, and exception noted. We are of the opinion that there was no error in the action of the court in sustaining the objection, as the testimony was not properly admissible in the absence of pleading to support it. This view seems to have obtained with counsel for defendant below, as evidenced by the amendment filed and heretofore discussed.

Pleadings of the parties are the allegations made by the parties to a civil, or criminal case, for the purpose of definitely fixing and presenting the issues to be tried and determined between them; and the facts from which the law draws the conclusion of non-liability, must be pleaded in the answer, where they are not stated in the petition.

Under section 914 of the Revised Statutes of the United States, it is provided that the practice, pleadings, forms and modes of proceeding in civil causes, other than equity and admiralty, in the Circuit and District Courts shall conform, as near as may be, to the practice, pleadings, forms and modes of proceeding existing in like causes in the Courts of record of the State in which such Circuit and District Courts are held.

The only object, and the avowed purpose of tendering this testimony, was to show the invalidity of the statute in so far as it related to trains engaged in inter-state traffic, and this, without special plea, would not be permissible under the prac-

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tice and pleadings obtaining in Georgia, See Parham & Co. vs. Potts-Thompson Liquor Co. 56 S. E. 460 and cases there cited.

The validity, or invalidity of a Statute, can not be considered upon appeal, unless the record shows that the question was distinctly raised in the pleadings in the Court below.

Savannah etc. Ry. Co. vs. Hardin, 35 S. E. 681.

A subsequent assignment complains of the refusal to direct a verdict for the defendant. The evidence was sharply in conflict and the charge requested, would have invaded the province of the Jury.

The last assignment seeks to review the following paragraph of the general charge to the Jury:

"Under the statutes of Georgia, gentlemen, which have been referred to, it is the duty of engineers of trains in Georgia when approaching a crossing(to blow the whistle, as stated to you by counsel, and to check, and keep checking their trains as they approach the crossing, so as to be able to stop them if any person or thing should be upon the crossing. That is the statute of this State, and it is entirely clear that they were not doing that in this case; so there is no question that the railway company, through its servants and agents, was guilty of negligence. I, therefore, instruct you as a matter of law, that the defendant through its servants, agents and employees was guilty of negligence."

This point is reserved, but the brief contains neither authority nor argument in support of the proposition. The failure to comply with a state statute is held to be negligence per se in Georgia and many other jurisdictions. The engineer testified that he sounded the whistle at the blow-post, 400 yards from the crossing, but did not continue to blow until the crossing was reached, and made "no effort to comply with the statute in any other particular," and only attempted to check his train when he realized the danger of collision. The object of blowing the whistle is to give timely warning of the approach of the

train. It follows that, if a person about to go upon the crossing, sees, hears, or otherwise knows of the approach of the train in time to avoid injury, the object of the statute has been accomplished, and in that event failure to give the statutory warning would not be negligence. This view occurred to the trial court, and the record discloses that upon this point the jury was charged:

"If by the exercise of ordinary care and prudence the deceased could have ascertained by the use of his sense of hearing, and of sight, that the train was approaching, and thereby avoided the accident, his widow can not recover in this action."

And further:

"If you believe that King drove on the crossing without having stopped and listened, and if he had listened he would have heard the approach of the train in time to have avoided the injury, then, I charge you that his widow can not recover."

If the charge is error, which we do not concede, it is rendered harmless by the further charge, to-wit:

"Notwithstanding the negligence of the defendant (in failing to comply with the statute) if the deceased, by the exercise of ordinary care could have avoided the consequences of defendant's negligence, his widow can not recover."

The same rule was applied to the daughter, with the exception that the negligence of the father, if any, could not be attributed to her.

Upon the whole case, as made by the pleadings and testimony, the law was clearly presented, the assignments disclose no error, and the judgments should be in all things affirmed."

Your petitioner shows that the enforcement of the Statute in Georgia known as the "Blow-Post Statute," set out above, is a direct burden upon its inter-state commerce operations; that the majority of the United States Court of Appeal, in the

above decision, erred in holding that the enforcement of said Statute was not an enfringement of the inter-state commerce clause of the Federal Constitution.

Your petitioner further shows that the Federal question thus made is one of great importance; not only in the State of Georgia, but wherever inter-state carriers may be operated; that the principal therein contained is applicable to many thousand crossings in the State of Georgia, and would likewise be applicable throughout the entire United States; that the Federal question thus made arose after the case had been removed into the United States Circuit Court, and was passed on by the Circuit Court of Appeals.

Your petitioner believes that the aforesaid judgment of the Circuit Court of Appeals is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such case made and provided.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals, for the Fifth Circuit, commanding the said Court to certify and send to this Court, on a day certain, to be designated, a full and complete transcript of the record, and all proceedings of the said Circuit Court of Appeals in said case therein entitled SOUTHERN RAILWAY COMPANY, Plaintiff in Error, vs. Mrs. JOSEPHINE KING, Defendant in Error, No. 1634. to the end that the said case may be reviewed and determined by this Court, as provided in Paragraph Sixth of the Act of Congress entitled an Act to Establish Circuit Courts of Appeal

and to provide and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes, approved March 3, 1891; or that your petitioner may have such other and further relief, or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act; and that the said judgment of the said Court of Appeals in the said case, and every part thereof may be reversed by this Honorable Court. Your petitioner presents herewith a Brief sustaining his application for certiorari, and likewise a certified copy of the transcript of record, including therein all the proceedings of the United States Circuit Court of Appeals; and your petitioner will ever pray, etc.

JNO. J. STRICKLAND,
Counsel for Petitioner.

STATE OF GEORGIA,
COUNTY OF CLARKE, } JNO. J. STRICKLAND being duly sworn says that he is one of the Counsel for the Southern Railway Company, the petitioner, that he prepared the foregoing petition, and that the allegations thereof are true, as he verily believes.

JNO. J. STRICKLAND.

Subscribed to and sworn before me by JNO. J. STRICKLAND. This ——— day of April, 1908.

My Commission expires Feb. 17, 1912.

ROY M. STRICKLAND,
N. P. Clarke County, Ga.

NOTICE OF APPLICATION
TO THE SUPREME COURT OF THE UNITED STATES
FOR WRIT OF CERTEIORARI.
UNITED STATES SUPREME COURT.

THE SOUTHERN RAILWAY COMPANY,
Petitioner,
vs.
JOSEPHINE KING,
Respondent.

The respondent is hereby notified that the petitioner the SOUTHERN RAILWAY COMPANY, will, on Monday the ——— day of ——————— 1908, upon its verified petition, and a copy of the entire record in this case, at the opening of the Court, on that day or as soon thereafter as Counsel can be heard, submit a motion, a copy of which, and of the petition for writ of certiorari, and Brief in support thereof, are herewith delivered to you to the Supreme Court of the United States in its Court Room, at the Capitol in the City of Washington, D. C.

JNO. J. STRICKLAND,
Atty. for Petitioner, Southern Ry. Co.

The foregoing notice is hereby accepted and delivery of a copy thereof, and of the petition for writ of certiorari and Brief in support of the petition, are hereby acknowledged.

_____
Attorney for Respondent.

The———day of———1908.

THE SUPREME COURT OF THE UNITED STATES.

———————Term, 1908.

SOUTHERN RAILWAY COMPANY,
Petitioner,
vs.
JOSEPHINE KING,
Respondent.

COMES NOW the SOUTHERN RAILWAY COMPANY, by JNO. J. STRICKLAND, Esq., its Counsel, and moves this Honorable Court that it shall, by certiorari, or other proper process directed to the Honorable the Justices of the United States Circuit Court of Appeals for the Fifth Circuit, require said Court to certify to this Court for its review and determination a certain case in said Court of Appeals, lately pending, wherein the respondent, JOSEPHINE KING, was defendant in error, and your petititioner the SOUTHERN RAILWAY COMPANY, the plaintiff in Error, and to that end it now tenders herewith its petition, and Brief, with a certified copy of the entire record case in said Circuit Court of Appeals.

JNO. J. STRICKLAND,
Counsel.

UNITED STATES SUPREME COURT.

SOUTHERN RAILWAY COMPANY,
Petitioner,
vs.
JOSEPHINE KING,

Error to the U. S. Circuit Court of Appeals.

BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

JOSEPHINE KING filed her suit in the Superior Court of Habersham County on the 16th day of February, 1904, for ~~NINETEEN HUNDRED AND NINETY FIVE ($1995.00)~~ $10000 ten thousand DOLLARS, damages against the SOUTHERN RAILWAY COMPANY, alleging in substance that on the 20th of September, 1903, she and her husband, A. O. KING, and her daughter, Inez King, were riding in a buggy, and approached a crossing of the defendant Railway at a place where they could not see the approach of a train; that a train of the defendant company, as they were crossing, ran into them; that the same was running in violation of the Statute of the State of Georgia, requiring it to check and keep checking in approaching a crossing, and killed her husband, injured her daughter, and injured herself. She prayed judgment for the injury she had ~~personally~~ sustained for husband's death.

During the progress of the case Ben Dewberry, an Engineer of the Company was a witness on the stand and the following occurred:

"BEN DEWBERRY, stated that:

'There are between ninety-and one-hundred crossings on the

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Southern Railway, between the South Carolina line and Atlanta.'"

"Plaintiff's counsel said:

'I object to that question and to the answer, because incompetent, immaterial and inadmissible. I think the entire case should be confined to this crossing.'"

"Counsel for defendant then stated:

'I expect to prove that between the South Carolina line and Atlanta, there are practically one-hundred road crossings, or between eighty-five and one-hundred public road crossings; that the distance is one-hundred and one miles; that the crossings in some localities are very close together, and within a few hundred yeards of each other, and at others farther apart, but on the average making a crossing to the mile almost. We expect to show further, that to observe the statute and check and keep checking so as to have a train under control, and to stop should any person or thing be on the crossing it would consume from five to ten minutes for each crossing dependent, of course, upon the weight and length of the train, and the grade; but it would m[illegible] average of seven or eight minutes. We wish to show that this train was made up and known as No. 39, the vestibule train which runs from the City of Washington, through the States of Virginia, North Carolina, South Carolina and Georgia; that it was carrying passengers from one state to another, also carrying an express car with freight on it, from one state to another. We wish and expect to show that obedience to that Crossing Act would hinder, and practically prevent inter-state business being done by the defendant railroad. We wish to show the condition I have just

stated all existed at the time this accident occurred, on the 11th of October, 1903.'"

"By the Court:

'The testimony will be excluded, and you may have an exception noted to this ruling.'"

SPECIFICATION OF ERRORS RELIED UPON.

The Plaintiff in Error relies upon the following errors:

I.

The Court erred in striking the amendment setting up that the Crossing Statute was inapplicable to an inter-state railroad.

II.

The Court erred in ruling out the evidence of Ben Dewberry.

The next question involved is whether or not the amendment seting up that the checking statute was inapplicable to an inter-state railroad was a good defense.

The Statute Section 2222 of the Civil Code of Ga., is as follows:

"There must be fixed on the line of said road, and at the distance of four hundred yards from the center of each of such road crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road."

Section 2224 of the Code provides in part as follows:

"If any engineer neglects to blow said whistle as required and to check the speed as required, he is guilty of a misdemeanor," etc.

Plaintiff in error insisted below that the part of this statute requiring it to check was inoperative as to it, because plaintiff was an inter-state railroad, doing an inter-state business, including carrying the mail, and that this act was a burden upon

its inter-state business, and in violation of the commerce clause of the Federal Constitution.

The demurrer to the plea admitted the allegations therein made, but insisted that it did not constitute a legal defense. I submit that the plea set up a legal defense and should not have been stricken on demurrer for the following reasons:

INTER-STATE COMMERCE COMMISSION.

1. The Federal Congress has provided for Inter-state Railroads: Revised Statute, Paragraph 5258 provides as follows:

"Every railroad company in the United States, whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and other property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of designation."

By the Act of Feb. 4, 1887, entitled: "An Act to Regulate Commerce", Congress created the Inter-state Commerce Commission, and enacted that the provisions of that Act should "apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment from one state or territory of the United States, or the District of Columbia, to any other State or territory of the United States * * * * and that it should be unlawful for any common carrier subject to the provisions of the Act, to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedules, carriages in different cars, or by other

means or devices, the carriage of freight from being continuous from the place of shipment to the place of destination."

These Acts not only provided for interstate business, but likewise placed the same under the control of the Commerce Commission, and prevented them from entering into any contract which should have the effect to thwart the purposes of the interstate traffic. The interstate carrier is amenable to the Interstate Commission should it fail to discharge its duties as a carrier or to carry freight or passengers in a reasonable time and the State Commission has required freight to be moved a given number of miles per day and the carrier is liable both in penalty and damages for failure.

POLICE REGULATIONS.

2. It is insisted that the Statute under consideration is good because it is an exercise of the police power of the State. This police power has its limitations, and if it infringes the interstate commerce clause of course is void. It is not necessary that Congress should expressly enact a supervision over the interstate commerce, the Constitution itself provides for it.

Mr. Justice Field speaking for the Court in the case of Wellton v. Missouri, 91 U. S., 282, with reference to this question says:

"Non action by Congress is equivalent to a declaration that interstate commerce shall remain *free* and *untrammelled.*"

Does an Act of the Legislature of a State which requires that an inter-state railroad shall check its trains at each crossing to the extent that it cannot carry on its business, leaves inter-state commerce *free* and *untrammelled?* It is not good as police regulation unless it does.

Mr. Justice Gray, in the case of Ill. Cent. R. R. Co., vs. Ill., 163 U. S., page 154, in discussing what is a reasonable regulation by a State says:

"The State may make reasonable regulations to secure the safety of passengers, even on interstate trains, while within its borders. But the state can do nothing which will directly *burden* or *impede* the interstate traffic of the company, or *impair* the *usefulness* of its *facilities* for such traffic."

It was offered in evidence in this case to show that from the South Carolina line to Atlanta, Ga., there were about one-hundred crossings, and about one-hundred and one miles, or about a crossings to the mile; that a train observing the statute under consideration would lose from five to ten minutes at each crossing; that it would thus take hours to go from the State line to the City of Atlanta above its present schedule. Can it be said that such a statute will not *burden* or *impede* the interstate traffic of the Company, or that it will not *impair* the usefulness of its facilities for such traffic? Burden is defined: "To incumber with weight (literal or figurative); to law a heavy load upon, to load". Impede is defined: "To hinder; to stop in progress; to obstruct". Impair is defined: "To make worse; to diminish in quality, value, excellence or strength: to deteriorate".

ADJUDICATED CASES.

3. The Statute under consideration is peculiar to Georgia. I have found nothing like it anywhere else, nor have I been able to find an authority dealing directly with the question made.

Mr. Elliott in his work on Railroad, Vol. 2nd, paragraph 668, uses this language:

"The authorities are agreed that where the trains move upon

or across highways their speed may be regulated, but there is a contrariety of opinion as to whether the speed of trains operating exclusively upon the private property of the company can be limited."

He cites as authority to support this text a number of State cases, but so far as I have been able to find they all have dealt with intra-railroads and the question at bar was not involved. A kindred question and the principle has been before the U. S. Supreme Court several times.

In the case of Ill. Central R. R. Co. vs. Ill., 163 U. S., page 154, it was held that an act of the State of Ill., requiring all trains to stop at the town of Cairo was an unreasonable exercise of police power of the State as applied to inter-state railroads.

In the case of Gladstone v. Minnesota; 166 U. S., page 431, it was held that the doctrine announced in the 163d U. S., above quoted was not applicable because the road in question was an Intra-state railroad.

In the case of Lake Shore & Michigan Ry. Co. vs. State of Ohio, reported in the 173d U. S., page 285, it was held that a statute requiring three trains each way to stop at each town of 3,000 inhabitants daily was a reasonable exercise of the police power. I call atention of the Court to the dissenting opinion of Mr. Justice Shiras found on page 309 of the report, which goes into the authorities pertaining to the case; and likewise the opinion of Justices Brewer, White, and Peckham concurring in this dissenting opinion contained on page 335.

The case of Cleveland, Chicago, Cincinnati & St. L. R. R. Co., reported in 177 U. S., page 514, the head note is as follows:

"The requirement that all regular passenger trains must stop at County seats, which is made by the Illinois Act of March 21, 1874, constitutes a direct burden upon inter-state commerce in violation of the U. S. Constitution, so far, at least, as that statute requires through inter-state passenger trains to stop at such station when adequate train service has been provided for local traffic.

This case takes up a number of cases cited. It quotes from Mr. Justice Gray, as follows:

"The State may doubtless compell the railroad company to perform the duty imposed by its charter of carrying passengers and goods between its termini within the State. But so long, at least, as that duty is adequately performed by the company, the State cannot, under the guise of compelling its performance, interfere with the performance of paramount duties to which the company has been subjected by the Constitution and laws of the United States."

This case further calls attention to the fact that that of Gladson vs. Minnesota, above cited, is upheld upon the ground that it was dealing with an Intra-State railroad.

It further calls attention to the fact that the case above cited in the 173 U. S., page 285, can be upheld upon the grounds that it only applies to three trains running each way each day and leaves a loophole for through trains.

Mr. Justice Brown, in delivering the opinion of the Court in the 177 U. S. above cited, uses this language:

"It is evident that the power attempted to be exercised under this statute would operate as a serious restriction upon the speed of trains engaged in inter-state traffic, and might, in

some cases, render it impossible for trunk lines running through the State of Illinois to compete with other lines running through states in which no such restrictions were applied. If such passenger trains may be compelled to stop at county seats it is difficult to see why the legislature may not compel them to stop at every station,—a requirement which would be practically destructive of through travel, where there were competing lines unhampered by such regulations. While as we held in the Lake Shore case, railways are bound to provide primarily and adequately for the accommodation of those to whom they are directly tributary, and who not only have granted to them their franchise, but who may have contributed largely to the construction of the road, they are bound to do no more than this, and may then provide special facilities for the accommodation of through traffic. We are not obliged to shut our eyes to the fact that competition among railways for through passenger traffic has become very spirited, and we think they have a right to demand that they shall not be unnecessarily hampered in their efforts to obtain a share of such traffic. It is evident, however, that neither the greater safety of their tracks, the superior comfort of their coaches or sleeping berths not the excellence of their tables would insure them such share if they were unable to compete with their rivals in the matter of time. The great efforts of modern engineering have been directed to combining safety with the greatest possible speed in transportation, both by land and water. The public demand this, the railway and steamship companies are anxious in their own interest to furnish it, and local legislation ought not to stand in the way of it." "While

the Statute in question is operative only in the State of Illinois, it is obnoxious to the criticism made of the Louisiana statute in Hall v. DeCuir, 95 U. S. 485, that 'while it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct, to some extent, in the management of his business throughout his entire voyage. If each state were at liberty to regulate the *conduct* of *carriers* while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight regardless of the interest of others."

The principle above announced with reference to the statute requiring each train to stop at each county seat would doubly apply to a Statute that required each train to stop at each public crossing. If stopping once in each county, many miles apart, is a burden, what is to be said of a statute requiring the train to stop once each mile?

Applying this rule to the evidence in the case and it seems there can be no doubt of the effect of the statute. As stated, for the purpose of the demurrer it was admitted that the railroad could not carry on its business in consequence of the necessary delay, if required, to comply with this statute.

Another view of the operation and effect of the statute is worthy of consideration. The statute was enacted in 1852, at a time when there were no inter-state railroads and very few others in Georgia. There is not a road in the State which attempts to comply with the statute. While the act provides that the engineer who fails to observe the same is guilty of a mis-

demeanor, no engineer has ever been prosecuttd for such violation, except where some special damage case rendered it necessary. It is a statute therefore enacted at a tim when inter-state railroad companies did not exist. It is recognized by the railroads themselves as inoperative. The public demands a speed that cannot be obtained and observe this statute. The public fail and refuse to prosecute the engineer violating the statutes hundreds of times every day, because doubtless they realize its hardship. Such a statute when it is apparent that if enforced it would break up inter-state railroad business; that it would prevent the mails from being carried, and render it impossible for an inter-state road to comply with the requirements of the inter-state railroad commission as well as the State Commissions the same should be declared void.

As was said by the learned Judge, who delivered the opinion in this case in the Circuit Court of Appeals:

"The question of the validity of State Statutes and orders of State railroad Commissions directing the stoppage of through inter-state trains have frequently, within late years, been before the Supreme Court of the United States. One of the recent cases is that of Mississippi Railroad Commission vs. Illinois Central 203 U. S. 335, and Atlantic Coast Line Railroad vs. North Carolina Commission, 206 U. S. 1. The late declaration by the Supreme Court is found in the opinion rendered Dec. 9, 1907 in Atlantic Coast Line Railroad vs. South Carolina Commission, in which Mr. Justice Peckham speaking for that tribunal uses the following language:

"That any exercise of State authority in whatever form manifested, which directly regulates inter-staate commerce is repugnant to the commerce clause of the Constitution, is ob-

vious. It hence arises that any command of a State, whether made directly or through the instrumentality of a railroad commission, which orders, or the necessary effect of which is to order, the stopping of an interstate train at a named station or stations, if it directly regulates inter-state commerce, is void.'"

The case of Gladson vs. Minnesota, 166 U. S., page 430, upon which the Court below rests, its decision was dealing with an intra-state railroad, and the question decided in that case, I respectfully submit, so far from being authority against my contention, is in support of it. In that case the railroad in question was chartered by the State of Minnesota; it had its franchise from that State. While it connected with other roads, it was doing purely an intra-state business. It was amenable to the power that created it. It took its franchise with a burden of obeying the conditions upon which it was created. In the case at bar the Southern Railway Company was a foreign corporation, chartered by the State of Virginia, and was operating in Georgia by virtue of the authority of an Act of Congress. While it is amenable to the laws of Georgia, the State cannot impose a burden, or in any way impede its usefulness as a means of inter-state traffic.

In the Minnesota case, stated above, the railroad was chartered by that State. In the case at Bar, the railroad is chartered by another State.

In the Minnesota case the Railroad in question was doing purely an intra-state business. In the case at Bar the railroad in question was doing principally an inter-state business.

In the Minnesota case the railroad operated by the authority of that State alone. In the case at Bar the Southern Railway operated by the authority of the Federal Congress.

The idea that a State may regulate its own creature, and the reason therefor is recognized by the learned Justice delivering the opinion in the Minnesota case, where he says, on page 431, "The Legislature of the State may well treat it as one important object of establishing a railroad within the State that public officers, parties to action, jurors, witnesses and citizens generally should be enabled the more promptly to reach and leave the centers to which their duties or business may call them, to require every regular passenger train running wholely within the limits of the State to stop at all stations, at County seats directly in its course for a few minutes and at a trifling expense, in order to take on and discharge passengers with safety, is a reasonable exercise of the police power of the State, and cannot be construed a taking of property of the company without due process of law, nor an unconstitutional interference with inter-state commerce, or with the transportation of the mails of the United States."

The case further goes on and distinguishes it from that of the Illinois Central R. R. Co., 163 U. S. 142, by calling attention to the fact that in the latter case, was where a train was running "carrying inter-state passengers and the U. S. Mails from Chicago in the State of Illinois, to places in other States South of the Ohio River, from an inter-state highway, established by authority of Congress," etc.

Thus recognizing the difference between the application of the relation to an intra-state Railroad, operating by the authority of the State, and an inter-state Railroad operating by the authority of Congress.

This Court, in the case of Cleveland, Cincinnati, Chicago &

St. Louis Ry. Co., 177 U. S., on page 519, in dealing with the case of Gladson vs. Minnesota, recognizes the distinction that I have endeavored to point out between that and this, and in this case distinguishes the Gladstone case from the one being considered as to leave it of no weight as authority.

The case of Cleveland vs. Ry. Co. 177 United States, being considered, was where a Statute of Illinois, dated March 21, 1874, requiring that all regular passenger trains must stop at County seats, was held to be a direct burden upon inter-state commerce, and therefore void. On page 514 this language is used: "The requirement that all regular passenger trains must stop at County seats, which is made by the Illinois Act of March 21, 1874, constitutes a direct burden upon inter-state commerce, in violation of the United States Constitution, so far at least as that Statute requires through inter-state passenger trains to stop at such stations, when adequate train service has been provided for local traffic."

This case clearly draws the distinction; it is dealing with a statute requiring a train to stop at the county seat. The Gladson case, above cited, is likewise dealing with the same character of Statute in Minnesota. In this case the statute is held a burden upon inter-state commerce. In the Gladson case the Statute is upheld. The reason they are both upheld can only be that the one was an intra-state train being controlled, and the other an inter-state.

EFFECT OF STATUTE.

In the case of Morgan Steamship Company, 118 U. S., page 455, it is said: "In all cases of this kind it has been repeatedly held that when the question is raised whether the State statute

is a just exercise of state power, or is intended by roundabout means to invade the domain of Federal authority, this court will look into the operation and effect of the statute to discern its purpose."

Applying this rule to the evidence in the case and it seems there can be no doubt of the effect of the statute. As stated, for the purpose of the demurrer it was admitted that he railroad could not carry on its business in consequence of the necessary delay, if required, to comply with this statute.

Another view of the operation and effect of the statute is worthy of consideration. The statute was enacted in 1852, at a time when there were no inter-state railroads and very few others in Georgia. There is not a road in the State which attempts to comply with the statute. While the act provides that the engineer who fails to observe the same is guilty of a misdemeanor, no engineer has ever been prosecuted for such violation, except where some special damage case rendered it necessary. It is a statute therefore enacted at a time when inter-state railroad companies did not exist. It is recognized by the railroads themselves as inoperative. The public demands a speed that cannot be obtained and observe this statute. The public fail and refuse to prosecute the engineer violating the statutes hundreds of times every day, because doubtless they realize its hardship. Such a statute when it is apparent that if enforced it would break up inter-staate railroad business; that it would prevent the mails from being carried, and render it impossible for an inter-state road to comply with the requirements of the inter-state railroad commission as well as the State Commissions the same should be declared void.

IMPORTANCE OF THE QUESTION PRESENTED.

In presenting this application for certiorari I have not lost sight of the rule that a certiorari is not a matter of right, but one of grace, and will only be granted where the question submitted is of such importance as to require it. In this case I think it should be granted for the following reasons:

1. As a means for securing uniformity of decision among the several Courts of Appeal. The question made is one liable to arise in any jurisdiction, and it should be determined by this Court for the benefit of all.

2. It is a Federal question, involving the interest of the public, and of the Railroads through the entire State of Georgia, and through the entire United States, where the operation of inter-state Railroads are liable to be interferred with. There are thousands of such crossings in the State of Georgia where the Statute being called into question is being violated daily. It is a matter that involves, annually, many thousands of dollars. It is impossible, as appears from a quotation of a decision of the Supreme Court of Georgia, in the opinion rendered in this case, for the railroads to obey this statute. There is no effort being made to obey it; and yet if an accident happens at a crossing, under this Statute, there is absolutely no defense.

3. While the rule in the Federal Court, that a man approaching a crossing must look and listen, or he cannot recover for injury, yet this Statute requires the railroad to give notice and check so as to stop if the careless should be on the crossing.

4. The Court below rendered a divided opinion. The Court itself is therefore not uniform. The Justice writing the opinion did not subscribe to that part of it upholding the Statute in

question. The Court of Appeals in another Ciricuit might agree on a similar question with the Judge writing the opinion in this case. Thus different opinions on the same question will arise, and it should be determined by this Court for the benefit of all.

5. The opinion of the majority in the Court below, petitioner respectfully submits, is not in line with the decisions of thia Court cited in the Brief, and the question should therefore be reviewed.

Respectfully submitted,

JNO. J. STRICKLAND,

Attorney for Petitioner, So. Ry Co.

SOUTHERN RAILWAY CO.
Petitioner

vs.

MRS. JOSEPHINE KING,
~~By Next Friend~~,
Respondent.

In the Supreme Court
of the
United States.

Brief for MRS. JOSEPHINE KING, ~~by Next Friend~~,
In Opposition to the Petition for Certiorari.

In preparing this brief we will follow the rule laid down for the filing of briefs for defendants in error and will omit a statement of the facts and will also omit any specification of the errors, except in so far as to make clear our discussion of the law.

The opinion of the Circuit Court of Appeals fully sets forth the facts. Defendant did not show how or wherein the statute of Georgia complained of interferred with interstate commerce, except that in its opinion the checking of the speed of trains would render schedules slower. The defendant in its answer

merely set up that the train which injured the plaintiff was a through train, made up in Washington, D. C., and carried the mail, express, merchandise and passengers, and was doing an interstate business; and the answer further set up the provisions of the blow post law of Georgia, and wound up with the conclusion that the statute was a burden on and impeded interstate traffic.

Upon the trial of the case, the defendant proposed to prove by Engineer Dewberry that between the South Carolina line and Atlanta, there were between ninety and one hundred crossings, counsel stating that

"There are practically one hundred road crossings, or between eighty-five and one hundred public road crossings; that the distance is one hundred and one miles; that the crossings in some localities are very close together and within a few hundred yards of each other, and in others further apart, but on the average making a crossing to a mile almost. We expect to show further, that to observe the statute, and check and keep checking so as to have the train under control, and to stop should any person or thing go on the crosing, it would consume from five to ten minutes for each crossing, dependent of course, upon the weight and length of the train and the grade; but it would make an average of seven or eight minutes."

It will be observed that this offer of testimony was vague, that it did not state how close together the crossings were, and that it did not pretend to show with any degree of accuracy how much it would impede a train from the South Carolina line to Atlanta to comply with this Act, whether it would lose one

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hour or two hours or any other given time, was not stated by counsel.

There are many inadmissible portions in the proposed testimony, and the court will observe that it was offered as a whole. If as a whole it was inadmissible, then no particular fragment can be picked out and passed on by the court. It will be further observed that there was no claim that this train carried the United States mail, and as a matter of fact, it did not, so far as the evidence shows. The counsel was indefinite as to the distance apart of the crossings. There was no attempt at exactness. He was indefinite as to the time it would delay each train. He did not show how much it would delay any given train, nor how it would prevent interstate business from being done.

It will be observed that the defendant's answer which set up this defense had been stricken by the judge, and no exception was taken to the action striking this answer, and sustaining plaintiff's demurrer. It seems to us that this is the logical way to have raised the question.

After the demurrer to this amended answer was sustained and when the defendant offered evidence to sustain the subject-matter of that answer, it follows that there was no pleading to sustain the evidence, that answer having been stricken out of the case.

But in case the Court should consider this question upon the merits, we will now discuss it.

The blow post law of Georgia is a police regulation for the public safety. It is intended to protect travelers upon the public

highway when that highway is crossed at grade by a railroad. Grade crossings are most perilous situations. In many States they are not allowed to exist at all, either by the public law or the railroads, building over or under. It is undoubtedly within the province of the State's police power to abolish them altogether. If it can absolutely abolish them it can certainly put any conditions it pleases upon their maintenance.

It is not every remote interference with interstate commerce which is beyond the State's powers. Nearly every law of general application affects to some extent interstate commerce. If the law is not intended primarily to affect interstate commerce, and is only a police regulation for the public health, safety or morals, a remote interference with interstate commerce has been uniformly held to be within the State's power.

The Supreme Court of the United States has passed upon many cases of alleged interference with interstate commerce by the States. It has been said in several cases that each case must be decided as it comes up, and it is difficult to lay down general rules.

It has also been stated in a number of cases that the State's power to legislate upon these subjects is only limited whenever Congress has undertaken to regulate the same subject. Whenever Congress undertakes to legislate upon a particular subject matter pertaining to interstate commerce, the State cannot legislate upon the same subject so as to interfere with the national law in any particular.

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What is known as the blow post law of Georgia is found in Secs. 2220, 2221, 2222, 2223, 2224, 2225 and 2226 of the Code of Georgia. It forms one scheme for the maintenance of public highways at grade over railroads, and for the operation of trains over the same. This Act was passed in 1852, long before any railroad now operating in Georgia acquired any franchise therein. The Georgia Railroad and Banking Company, and the Central Railroad and Banking Company, were then in existence, but are not now operating at the present time under their franchises, and lessees are in possession. Therefore, every railroad company in Georgia to-day takes its franchise and its right to operate subject to the provision of this law, which has been sustained and applied by the Supreme Court of Georgia in scores of cases.

A full history of this Act will be found in Southern Railway vs. Combs, reported in 124 Ga., p 1004. The law was passed January 22, 1852. The cause of its enactment was a horrible accident which occurred on December 14, 1851 at a road crossing in Monroe county, where a carriage containing a lady and four children, driven by a negro slave, was run into by a train of the Macon and Western Railroad Company, and two of the children and the driver killed, and the other occupants seriously injured. The cases growing out of this accident were reported in the case of Railroad vs. Davis, 18 Ga., 679; Railroad vs. Wynn, 19 Ga., 440, and Railroad vs. Wynn, 26 Ga., 250. We refer the court to the Comb's decision, so far as the literature pertaining to this Act and its history, is concerned.

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The Act required, so far as this case is concerned (first) that the whistle of the locomotive be blown continuously from a post to be located four hundred yards from the crossing until the crossing is reached; if the crossing is in an incorporated town, a continuous ringing of the bell for the same distance is substituted for the blowing of the whistle. (Second) Beginning at the blow post four hundred yards away the engineer must begin to check his train and keep checking so as to stop in time, should any person or thing be upon the crossing. He is not required to bring his train to a stop. The law does not fix any number of miles per hour as the speed at which he shall run anywhere between the blow post and the crossing. If the crossing is approached from a perfectly safe place, where there is a full view on both sides of any person or vehicle which might approach, necessarily much less checking is required to stop in time, should any person or thing be upon the crossing. If the crossing is approached from a sharp curve, where the engineer would have no chance to protect the person or vehicle upon the crossing until almost upon it, then necessarily much more checking would be required.

Is it not within the province of the State to require certain measures of diligence when going over a dangerous place like this?

The thing for the railroads to do if this law works a hardship upon them is to construct, at their own expense, underground and overhead crossings wherever practicable, and reduce the number of these grade crossings to a minimun. This would be best

both for the railroads and for the public. To maintain these grade crossings is a most dangerous undertaking and is so recognized everywhere. The time doubtless will come when if they are not maintained either under ground or overhead, that there will be gates and flagmen stationed at every crossing. Could it be doubted that the law could require that the railroads maintain a flagman at every crossing? Can it be doubted that the law could require a railroad to maintain a gate at every crossing, to be opened only when trains were not near? What is the difference in principle between a grade crossing where vehicles and pedestrains pass, and running over grade crossings with another railroad company? The law is universal that every railroad must bring its trains to a complete stop before running over another railroad track crossed at grade. No one has ever doubted the legality of this provision. Where is the difference in principle betwen a grade crossing with another railroad, and a grade crossing with a highway? There is the same danger of collision in both cases—in the one case with another railroad train, and in the other case with pedestrains or vehicles.

Inasmuch as we have only to deal with the civil side in the present case, would it not be competent for the State to enact that in every case where a railway company crosses a highway at grade, that the railway company shall pay for all damages done to persons or property upon that crossing? Laws have been sustained which absolutely make railroads liable under certain circumstances, irrespective of the question of negligence. From

a civil point of view the law in question does not forbid running over highways at full speed. It merely results in making the railway company liable in case person or property is injured there.

The law can abolish grade crossings altogether. If it allows railroad companies to maintain and keep them at all, does not the railroad company, impliedly at least, consent to every condition of the law which allows grade crossings to exist? Could not the law, as a condition of maintaining a grade crossing, exact liability of the railroad company operating at such dangerous points, for injuries occurring thereon? If a municipality can regulate the speed of a train through its limits, certainly can not the State regulate the speed of a train approaching a crossing?

It would be a huge proposition to overturn the blow post and checking laws of the several States which regulate grade crossings. This is a local matter. Each State has its own particular laws upon the subject.

An examination of the cases decided by the Supreme Court of the United States will overwhelmingly sustain this law. In Sherlock vs. Alling, 93 U. S., 99, the court says:

> "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating upon all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution."

In Smith vs. Alabama, 124 U. S., 465, the statute of Alabama requiring locomotive engineers to be examined and licensed, was

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held not to be a regulation of interstate commerce, and in the third head note of the report is the following:

> "Such statute, so far as it affects transactions of commerce among the States, does so indirectly, incidentally and remotely, and not so as to burden or impede them; and in the particulars in which it touches those transactions at all it is not in conflict with any enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence."

We may remark here that Congress has not enacted any legislation applicable to interstate carriers regulating the operation of trains at grade crossings. It is manifestly one of those subjects in which the State is left free to enact its own laws.

In the case of Crutcher vs. Kentucky, 141 U. S., 47, Mr. Justice Bradley uses the following language:

> "But whilst it is only such things as are clearly injurious to the lives and health of the people that are placed beyond the commercial power of Congress' yet when that power or some other exclusive power of the federal government is not in question, the police power of the State extends to almost everything within its borders; to the suppression of nuisances; to the prohibition of manufactures deemed injurious to the public health; to prohibition of intoxicating drinks, their manufacture or sale; to the prohibition of lotteries, gambling, horse-racing or anything else that the Legislature may deem opposed to the public welfare. (Citing authorities.) It is also within the undoubted province of the State Legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in regard to the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and, generally, with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce. Such regulations

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> are eminently local in their character, and in the absence of congressional regulations over the same subject, are free from all constitutional objections, and unquestionably valid."

The case of Chicago, etc. R. R. vs. Solan, 169 U. S., p 133, involved the validity of an Iowa statute prohibiting contracts to exempt a railroad company from liability, as a common carrier. The railway made the claim that as to interstate carriers this was a regulation of commerce, but the Supreme Court of the United States held otherwise, and Justice Gray, on pp 137 and 138 of the decision uses the following language:

> "The rules prescribed for the construction of railroads and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits. Such are the grounds upon which it has been held to be within the power of the State to require the engineers and other persons engaged in the driving and management of all railroad trains passing through the State to submit to an examination by a local board as to their fitness for their positions; or to prescribe the mode of heating passenger cars in such trains."

In Lake Short R. R. vs. Ohio, 173 U. S., 286, a statute of Ohio which required every railroad company operating within the State to cause three of its regular passenger trains each way daily to stop at every village containing over three thousand inhabitants long

enough to receive and let off passengers, was held to be a valid law, and not an improper regulation of interstate commerce.

In Gladson vs. Minnesota, 166 U. S., 427, it was held to be within the police power of the State to require all trains running between points within the State of Minnesota, to stop at county seats to let off and take on pasengers.

The exact question, as it occurs to us, involved in the present case, was decided in the case of Erb vs. Morasch, 177 U. S., 584, in which it was held that "a regulation by a city of the speed of railroad trains within the city limits is not, as to interstate trains, an unconstitutional regulation of interstate commerce,—at least, until Congress takes action in the matter."

In the case from which the quotation has just been taken, a regulation of Kansas City, Kansas, restricted the speed of all trains within its limits to six miles per hour. The objection there made is the identical one made in the case at bar, to-wit, that to cause the speed to slow down interfered with the rapid transit of these trains, and thus interfered with the carriage of the mails and of interstate commerce. There is not a particle of difference in principle betwen the two cases. To require a train to slow up its speed for a grade crossing no more interferes with interstate commerce than to bring it dow nto the speed of six miles in a city. If one city could pass such an ordinance, all cities could pass it. There are doubtless nearly as many villages, towns and cities as grade crossings. The principle which lies at the bottom of the decisions sustaining these laws is that they are intended to pro-

mote the public safety, and are not primarily regulations of commerce, and only affect it incidentally and remotely. In other words, as Justice Gray said in the Iowa case before cited, such regulations of the State are in aid of commerce. They make commerce safe and more advantageous to the public. The commerce which the United States wants to promote is not the commerce which takes life, or scatters pestilence, but the commerce which is reasonable, and which promotes the public safety, health and welfare. For this reason the regulations of the State which save life and health aid that commerce.

The cases cited upon the other side are not at all in point. The case of Cleveland R. R. vs. Illinois, 177 U. S., 514, held to be invalid an Illinois act which required all through interstate passenger trains to stop at every county seat, when adequate train service had already been provided for local traffic. This law of Illinois was said to be a direct burden upon interstate commerce, and justly so. The regulation attempted by the Illinois statute in this case was sheer tyranny. The railroad gave, and could be compelled, to give the county seats all the train service they required. After such train service was given, it neither aided the public health safety, commerce or convenience to require through trains to stop. Such a law was a mere attempt to fiix an arbitrary and unreasonable schedule for the railway company. It was beyond dealing with the mere question of convenience.

But it is obvious that an interstate mail train is as dangerous to life upon a public grade crossing as is a local train. There

is nothing arbitrary or unreasonable which makes the Georgia grade crossing law apply to all trains. Any of them will take life when a colilsion occurs with a pedestrian or vehicle. It was for this reason that in the Erb case before cited the ordinance of the Kansas town limiting the speed of interstate trains, as well as intrastate trains was upheld. If the State law is to apply to any trains at grade crossings it must necessarily apply to all of them. The law applies to any train which can go at high speed and take life. It would be absurd to enact a law which would say that a local freight or passenger train shall observe certain requirements of care at a crossing and thus save life, while an interstate mail train is allowed to observe no requirements whatever, and to take life ad libitum.

In the case just cited, of Cleveland, etc. R. R. vs. Illinois, 177 U. S., 514, Justice Brown reviews all the cases where State regulation of carriers has been sustained, and all of those in which such regulations have been held invalid.

The only other cases necessary to notice, holding a State regulation of the operation of trains doing interstate comemrce invalid, is Illinois vs. Illinois C. Rwy., 163 U. S., 141, in which a State statute requiring a fast mail train carrying interstate passengers over an interstate highway, to delay the transportation of the passengers and mail, by turning aside from the direct interstate route, and running to another station on another track 3 1-2 miles away from a point on the direct route and back again to the same point because such station is a county seat, and

where the railroad furnishes adequate accommodation for the county seat, was held to be an unconstitutional interference with interstate commerce and to the passage of the mails, and justly so. It will be observed that no question of public safety, health or morals was there involved, and the railroad had adopted by its schedules a scheme which gave the county seat in question all the trains it required, and yet gave to interstate commerce in the carriage of the mails the benefit of the highest speed obtainable betwen remote points.

In the Court below, two of the Circuit judges, Judges Pardee and Shelby, presided together with District Judge Burns, of Texas. The two Circuit judges concurred in the opinion that the statute of Georgia was a valid exercise of the police power, while District Judge Burns dissented

Judge Burns based his dissent mainly upon Central of Georgia Railway Company vs. Hall, 109 Georgia, 367; same case, 34 S. E., 605. In that case, the Supreme Court of Georgia upheld and enforced the blow post law of Georgia; but Chief Justice Simmons was merely stating his own views of the hardship of this law when he made the remark in the course of his opinion, that the statute was a hard one and that it was impossible for the railroads to transact the business of the country and obey it. He wound up his remarks upon the subject, however, by stating:

"Still, it is the law of the land and the courts must enforce it, however hardly it may work upon the business interests

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of the country if it should be observed, or upon the railroads when they violate it."

Other judges of the Supreme Court of Georgia, equally as distinguished, have enforced the law and thought it was a wise one.

Chief Justice Jackson, in the case of Brunswick and Western Railroad vs. Hoover, 74 Georgia, 428, in alluding to this law and after explaining its provisions, said:

> "Not only, therefore, is it negligence, but negligence of the grossest and gravest character, not to comply with these statutory enactments to preserve human life on the public highway, when that highway crosses the railroad track; so grave that it is made criminal not to comply with these enactments."

The blow post law was again enforced in the case of Williams vs. Southern Railway Company. 126 Georgia, 710; and again in the case of Central of Georgia Railway Company vs. North, reported in 129 Georgia, 106; and again in Western and Atlantic Railroad vs. York, 128 Georgia, 687.

We forbear to cite further cases in which this law has been enforced, and the dictum of Judge Simmons in the Hall case is the only expression of any judge which we have found in any of the Georgia cases which in any way intimates that the blow post law is a hard law.

We submit that the remarks of Judge Simmons in the Hall case, that it was impossible for the railroads to transact the business of the country and obey this law, are unwarranted and not borne out by a consideration of the Act The law does not

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require a train to absolutely stop at a crossing, but only to be in a condition of checking. In the great majority of instances, there are no persons on or near the crossing, and in such cases very little checking is required. In the instance of many crossings, the view on either side of the railroad is unobstructed for quite a distance, and an engineer can readily see that he can run over the crossing without the possibility of striking any person. He is only required to have his train in a condition of checking when somebody is liable to be in danger near the crossing, and ought not the law of Georgia protect human life under such circumstances?

Judge Burns thought that the statute was valid as to domestic corporations, but unreasonable as to trains engaged in interstate commerce. We submit that the statute is entirely valid as to both classes of trains.

Respectfully submitted,

Charles H. Hill

Reuben R. Arnold

Attorneys for respondent.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

NO. 140.

SOUTHERN RAILWAY CO., Plaintiff in Error, vs. MRS. JOSEPHINE KING, Defendant.	In Error to the Court of Appeals of the Fifth District.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

JOSEPHINE KING filed her suit in the Superior Court of Habersham county, on the 16th day of February, 1904, for Ten Thousand ($10,000.00) dollars, against the SOUTHERN RY. CO., alleging, in substance, that, on the 20th day of September, 1903, she and her husband, A. O. King, and her daughter, Inez King, were riding in a buggy and approached a crossing of the defendant Railway, at a place where they could not see the approach of a train and the train of the defendant Co., as they were crossing, ran into them.

She alleged that the Railroad was negligent in that the train was running in violation of the Statute of the State of Georgia requiring it to check and keep checking, when approaching a crossing. That her husband was killed, and she prayed judgment for the value of her husband's life, as authorized under the Statute of Georgia.

The Southern Railway Co., the defendant below, removed the case into the United States Circuit Court for the Eastern Division of the Northern District of Georgia.

In addition to the general answer filed, the Railway Co. filed an Amendment to its answer under an Order of the Court, in words as follows: (Page 20 of Record.)

"Now comes the Southern Railway Company, the defendant in the above stated case, and by permission of the Court first obtained, amends its answer already filed, and says plaintiff should not recover in this case for the following additional reasons:

PARAGRAPH XI.

At the time plaintiff alleges she was injured and for many years prior thereto, and now, defendant controls and operates a line of railroad from the City of Washington, D. C., through the States of Virginia, North Carolina, South Carolina, and into and through Georgia; said line forming a continuous line of railroad, the same having been formed under the Act of Congress, for the purpose of facilitating commerce among the several states, and the postal and military communications of the United States, and to that end for the purpose of carrying passengers, freight, government mails, troops and supplies from one state into another.

PARAGRAPH XII.

Defendant further shows that the train which plaintiff alleges injured her was a through train made up in the City of Washington, D. C., carrying U. S. mail, and

an express car of merchandise, and passenger coaches with passengers going from one state into another; and this defendant by said train was doing an inter-state business, under the authority and control of the Congress of the United States.

PARAGRAPH XIII.

Defendant further shows that the statute of Georgia, which is in these words, to-wit:

"There must be fixed on the line of said road, at the distance of 400 yards from the center of each of said crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof so as to stop in time should any person or thing be crossing said track on said road," the violation of which plaintiff alleges as the negligence in this case, is and was inoperative as to defendant's train, which plaintiff alleges injured her, for the reason that it is in violation of Section 8, Article First, of the Constitution of the U. S., which gives to Congress the right to "regulate commerce with foreign nations, and among the several states and with the Indian Tribes."

PARAGRAPH XIV.

Your defendant further shows that the Statute of Georgia is not a reasonable regulation of the police power of the state to secure the safety of persons, but that the Statute is a direct burden on and impedes the

inter-state traffic being done by this defendant, and impairs the usefulness of its facilities for such traffic.

PARAGRAPH XV.

Defendant further shows that it is impossible to observe said Statute and carry the mails as defendant is required to carry them under the contract it has with the government; and it is likewise impossible to do an inter-state business, and at the same time comply with the terms of said Statute.

Wherefore, it says that said Statute is inoperative as to it, and it should not be required to comply with the same on its inter-state line of railroad.

All which it stands ready to verify and prays that it be hence discharged with its reasonable cost."

The plaintiff below demurred to this amendment upon the ground that the same did not set up a defense good in law. After argument the Hon. W. T. NEWMAN, Judge, presiding, sustained the demurrer and struck the amendment. The case then went to trial.

During the progress of the case Ben Dewberry, an Engineer of the Company, was a witness on the stand and the following occurred:

"BEN DEWBERRY, stated that:

'There are between ninety and one-hundred crossings on the Southern Railway, between the South Carolina line and Atlanta."

"Plaintiff's counsel said:

'I object to that question and to the answer, because

incompetent, immaterial and inadmissible. I think the entire case should be confined to this crossing.'

"Counsel for defendant then stated:

'I expect to prove that between the South Carolina line and Atlanta, there are practically one-hundred road crossings, or between eighty-five and one-hundred public road crossings; that the distance is one-hundred and one miles; that the crossings in some localities are very close together, and within a few hundred yards of each other, and at others farther apart, but on the average making a crossing to the mile almost. We expect to show further, that to observe the Statute and check and keep checking so as to have a train under control, and to stop should any person or thing be on the crossing, it would consume from five to ten minutes for each crossing dependent, of course, upon the weight and length of the train, and the grade; but it would make an average of seven or eight minutes. We wish to show that this train was made up and known as No. 39, the vestibule train which runs from the City of Washington, through the States of Virginia, North Carolina, South Carolina and Georgia; that it was carrying passengers from one state to another, also carrying an express car with freight on it, from one state to another. We wish and expect to show that obedience to that Crossing Act would hinder, and practically prevent inter-state business being done by the defendant railroad. We wish to show the condition I have just stated all existed at the time this accident occurred, on the 11th of October, 1903.'"

"By the Court:

'The testimony will be excluded, and you may have an exception noted to this ruling.' "

A verdict was rendered for the plaintiff below. Motion for New Trial was made and overruled, and the case then carried to the United States Circuit Court of Appeals, being No. 1635 of the Fifth Circuit.

On the 3d day of March, 1908, the United States Circuit Court of Appeals handed down an opinion affirming the judgment of the Court below; all of the Justices of said Court agreeing upon all the propositions in the case, except the demurrer to the amended answer above set forth, and as to this proposition two of the Justices only assenting to the opinion, the other expressing a different view. A copy of said opinion as rendered appears in Record page 118.

A petition was made by the Southern Railway Co. for a Writ of Certiorari, which was granted on May 21, 1908. (Page 128 of Record.)

THE QUESTIONS INVOLVED AND HOW RAISED.

Thus, one question is made, namely: whether or not the Blow post Statute of Georgia, above set out, infringes upon the Commerce Clause of the Federal Constitution. The question was raised, first, by the amended answer, and, second, by the evidence tendered by Dewberry, being first raised by pleading and then by evidence.

SPECIFICATION OF ERRORS RELIED UPON.

The errors relied upon are:

1. Striking the amended answer.

2. Rejecting the evidence of Dewberry.

3. Holding the Blow post Statute of Georgia does not contravene the Commerce Clause of the Federal Constitution.

BRIEF.

I.

CONSTITUTIONAL QUESTION PROPERLY MADE.

1. The amendment filed by the defendant below alleging that the followiug Statute of Ga. known as the Blow Post Statute, to-wit: "There must be fixed on the line of said roads, and at a distance of four hundred (400) yards from the center of each such road crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road." is void because a burden upon Interstate commerce was in proper form and conformed to the laws of Georgia on the subject and properly raised the constitutional question mentioned therein.

S. F. & W. Ry. vs. Hardin, 110 Ga. 433.
Brown vs. State, 114 Ga. 60.
Sayor vs. Brown, 119 Ga. 54?.

2. When a constitutional question is not made or passed upon in the law Court, the Court of Review will

not consider it, though afterward argued there. The reverse of the proposition is likewise true.

Butler vs. Merritt, 113 Ga. 241.
Lafitte vs. Burke, 113 Ga. 1000.
State vs. Henderson, 120 Ga. 781.
Newkirk vs. Sou. Ry. Co.. 120 Ga. 1048.
Parkham vs. Potts Thompson Liquor Co. 127 Ga. 303.

3. Amendments to pleadings are authorized by Sections 5097 and 5098 of the Code of Ga. which are as follows: Sec. 5097. "All parties, whether plaintiffs or defendants, in the Superior or other Courts, whether at law or in equity, may, at any stage of the cause, as matter of right, amend their pleadings in all respects, whether in matter of form or of substance, provided there is enough in the pleadings to amend by. The defendant, after the first term, cannot set up new matter by way of amendment, except as provided in Section 5057."

Section 5098. "A petition showing a plaintiff, and a defendant, and setting out sufficient to indicate and specify some particular fact or transaction, as a cause of action, is enough to amend by. The jurisdiction of the Court may be shown and the details and circumstances of the particular transaction may be amplified and varied by amendment. If the declaration omit to allege facts, essential to raise the duty or obligation involved in the cause of action which was evidently originally intended to be declared upon, the omitted fact may be supplied by amendment."

Ellison vs. G. F. R., 87 Ga. 691.
Eagle Phoenix Mills vs. Muscogee Mfg. Co., 129 Ga. 715.

The same rule of amendments applies to the defendant's answer, except as to affidavit required by Section 5057 of the Code.

Roundtree vs. Rutherford, 65 Ga. 447.
Winn vs. Winn, 109 Ga. 255.

The section 5057 referred to as amended, is as follows: "The defendant, after the time allowed for answer has expired, shall not, in any case, by amendment set up any new facts or defense of which notice was not given by the original plea or answer, unless at the time of filing such amended plea or answer containing the new matter, he shall attach an affidavit that, at the time of filing the original plea or answer, he did not omit the facts or defense set out in the amended plea or answer, for the purpose of delay and that the amendment is not now offered for delay, or unless in the discretion of the Court the circumstances of the case or substantial justice between the parties require that such amendment be allowed without attaching such affidavit."

Acts of 1897, Page 35.

If the proper affidavit is attached, the Judge has no discretion but must allow the amendment.

The Judge in his discretion may allow the amendment without affidavit.

Marsh vs. Hicks, 110 Ga. 888.

The absence of the defendant is a reason for allowing the amendment without affidavit.

Boss vs. Guarantee City Co., 119 Ga. 127.

An attorney may make an affidavit.

Paullain vs. Pigg, 66 Ga. 263.

Any agent may make the affidavit.

Code 3035.

The Act, itself, does not provide who shall make the affidavit, but simply says: "Shall attach an affidavit."

II.

The evidence of Dewberry, offered and rejected by the Court, properly raised the constitutional question. All that is required by the laws of Ga. is that the question shall be raised below, and be passed on directly or indirectly and appear in the Record either in the pleadings, or the evidence, or other parts of the record.

Parker vs. P[illegible] Thompson Liquor Co., 127 Ga. 303.
S. F. & W. Ry. Co. vs. Hardin, 110 Ga. 433.
Newman vs. State, 101 Ga. 534.
Lafitte vs. Burke, 118 Ga. 1001.

The objections to the evidence of Dewberry were not upon the ground that there was no pleading authorizing it. Under the law of Ga. all objections to evidence not made are waived.

Jackson vs. State, 88 Ga. 784.
Steed vs. Cruise, 70 Ga. 168.
Christian vs. State, 86 Ga. 430.
Rhinehart vs. Blackshear 105 Ga. 799.
Summers vs. State, 116 Ga. 535.

III.

Commerce among the States consists, among other things, in intercourse and traffic, including in these terms the transportation and transit of persons and property and the instrumentalities thereof.

County of Mobile vs. Kimball, 102 U. S. 691, (26 L. E. 238.)
McCall vs. Calif, 136 U. S. 104 (34 L. E. 391.)
Williams vs. Fears, 179 U. S. 270 (45 L. E. 186.)
Champion vs. Ames, 188 U. S. 321 (47 L. E. 136.)

IV.

THE RESERVE POWER OF THE STATES.

There is no reserve power in the States to, in any way, regulate inter-state commerce. Where the apparent exercise of power has been upheld by the Courts, the power was either the mere declaration of a common law duty as applied to the instrumentalities of inter-state commerce or the exercise of some other reserved power not pertaining to commerce.

Cooke on Commerce Clause of Federal Constitution, pages 111 to 124, inclusive.
Western Union Tel. Co. vs. Call Pub. Co., 181 U. S. 92. (45 L. E. 765.)
Elliott on R. R. Vol. 3, page 1156.

V.

POLICE POWER OF THE STATE.

If the authority to regulate an interstate railroad train at a public crossing is embraced in the police power of a State, that authority must be so exercised as not to *burden* or *impede* the interstate traffic of the company, or *impair* the *usefulness* of its *facilities* for the traffic. "The police power of a State is not unlimited and is subject to judicial review, and when exercised in an arbitrary or oppressive manner, such laws may be annulled as violative of the rights protected by the constitution.

Ill. Cent. R. R. vs. Ill., 163 U. S. 154.
L. S. & M. S. R. R. vs. State of Ohio, 173 U. S. 285.
(Dissenting opinion and authorities cited on pages 309 and 335.)

Cleveland & Chicago R. R. vs. St. Louis R. R. 177 ~~187~~ U. S. 514.

Miss. R. R. Commission, vs. Ill. Cent. 203 U. S. 335.

Atlantic Coast Line vs. N. C. Commission, 206 U. S. 1.

Morgan Steamship Co. vs ————————, 118 U. S. 455.

Jacobson vs. Mass. 197 U. S. 25.

Lawler vs. Steele, 152 U. S. 133.

Henderson vs. N. Y., 92 U. S. 259.

Lockner vs. N. Y., 198 U. S. 45.

Holden vs. Hardy, 164 U. S. 366.

Connelly vs. Union Sewer-pipe Co., 184 U. S. 540.

Gibbs vs. Ogden, 9th Wheat, 1 and 210.

Sennot vs. Davenport, 22 Howard, 227.

Mo. Ry. Co. vs. Harber, 169 U. S. 613.

Dobbins vs Los Angeles, 195 U. S. 223.

McLean vs. Ark., 211 U. S. 547.

"Commerce with foreign nations and between the states, which consists in transportation of persons or property between them, is a subject of national character and requires uniformity of regulation. Congress, alone, can deal with such transportation and its non-action is a declaration that it shall remain free from burdens imposed by State legislation."

Gloucester Ferry Co. vs. Penn., 114 U. S. 196, (29 L. E. 158.)

"Although it is expressly provided that the power of Congress to regulate shall be exclusive, it is obvious that in order to be effective, the exercise thereof must exclude the exercise of any conflicting power under authority of the State; inconsistent State legislation being to that extent superseded."

Cooke on Commerce Clause of Federal Constitution, page 109.

County of Mobile vs. Kimball, 102 U. S. 691. (26 L. E. 238.)

Leisy vs. Hardin, 135 U. S. 100. (34 L. E. 128.)

It is said with reference to the police power of a State that, "no definition of it, and no urgency for its use, can authorize a State to exercise it in regard to a subject matter which has been confided to the discretion of Congress, by the Constitution, but nothing is gained in the argument by calling it the police power."

Henderson vs. Mayor of N. Y. 92 U. S. 259 (23 L. E. 543.)

"Local enactment or regulation, even if based upon the acknowledged police power of a State must always yield in case of conflict with the exercise by the general Government of any power it possesses under the Constitution, or any right that instrument gives or secures."

Jacobson vs. Mass. 197 U. S. 25, (49 L. E. 649.)

"In general terms it may be said, that Federal control of commerce begins as soon as the subjects or operations of commerce are subjected to burdensome State legislation."

Prentice & Eagan on Commerce Clause of Federal Constitution, Page 61.
Walling vs. Michigan 110 U. S. 446.
Robinson vs. Taxing District, 124 U. S. 489.
Asher vs. Texas 128 U. S. 129.
McCall vs. Calif, 139 U. S. 104.
Brennan vs. City of Titusville, 153 U. S. 289.

VI.

The Statute under review is unconstitutional and void as to Inter-state railroads, for the following reasons:

1. There is no common law duty on a carrier to check its trains at a crossing, so as to stop if any per-

son or thing should be thereon, and there is no reserve power in a State to impose such burden on an Inter-state carrier.

2. The Act as applied to through trains is unreasonable. "The reasonableness or unreasonableness of a State enactment in a given case will determine whether or not the same is a proper exercise of police power."

L. S. & M. S. R. R. Co. vs. State of Ohio, 173 U. S. 301.

3. The Act in effect is to regulate an Inter-state carrier, and, thus, Inter-state commerce. "So long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its own will that such commerce shall be free and untrammeled, and any regulation of the subject by the State is repugnant to such freedom."

Brown vs. Houston, 114 U. S. 622 (29 L. E. 257.)
Welling vs. Mo., 91 U. S. 275 (23 L. E. 471.)
Transportation Co. vs. Parkersburg, 107 U. S. 691 (27 L. E. 584.)

To regulate is defined: "To adjust by rule, method, or established mode; to direct by rule, or restriction; to subject to governing principles or laws." (Webster's International Dictionary.)

4. The effect of the Statute is to burden, impede, and to impair the usefulness of the facilities of Inter-state carriers for such traffic.

Ill. Cent R. R. Co. vs. Ill., 163 U. S. 154.
Miss. R. R. Commission vs. Ill. Cent., 203 U. S. 346.

5. The Statute is not observed, and the engineers are not prosecuted for its violation, though the Statute so requires.

Penal Code of Ga., Section 517, provides: "If any engineer fails to blow the whistle and to check the speed as required, by Section 2222 of the Civil Code, he shall be punished as for a misdemeanor."

6. The Statute was passed before the days of Inter-state railroads; it was enacted by the State for the railroads of the State as they were then operated. Inter-state carriers operate by virtue of an Act of Congress passed since the day of the Ga. Statute, and which had the effect to supersede the Blow post Statute of Ga.

U. S. Revised Statutes, Par. 5258.

The evolution of the business world has rendered obsolete the Statute under review.

VII.

THE GA. DECISION OF THE QUESTION.

The constitutionality of the Ga. Statute under consideration has never been passed on by the Supreme Court of Ga. until recently, in the case of the Sou. Ry. Co. vs. Grizzle, reported in the 131st Ga. Page 287. That decision is a mere head-note decision. The only part of it bearing on the question is the first head-note, which is in these words: "The provision of the Civil Code Section 2222, requiring the engineer of a locomotive to check the speed thereof on approaching a public crossing, so as to stop in time should any person or thing be crossing, is not, with respect to a railroad company doing an Inter-state business, violative of Section 8, Article 1, of the Constitution of the United States, as being a regulation of Inter-state commerce, but is a

police regulation designed to secure the public safety, and is valid, as such.

Hennington vs. State, 90 Ga. 396. (17 S. E. 1009.)

Seale vs. State, 126 Ga. 644, (55 S. E. 472.)

Hennington vs. Ga. 163 U. S. 299, (16 Sup. Court, 1086, 41 L. E. 166.)

The Court committed no error in refusing to allow an amendment offered by the defendant railroad Co., in this case, alleging that the Code Section above cited was void because of being violative of the provisions of the Constitution of the United States above referred to, and that the failure to comply with the requirements of such Code Section by the defendant company, in the operation of one of its trains then engaged in doing an Inter-state business, could not lawfully be attributed to it as negligence."

This decision is predicated upon the case of Hennington vs. State of Ga., 163 U. S. 299. The Hennington case is of doubtful soundness. Mr. Justice Brewer took no part in the decision. The Chief Justice and Mr. Justice White dissented. The decision has since been criticised by Mr. Justice Shiras, in the case of L. S. & M. S. R. R. vs. State of Ohio. 173 U. S. 296, in words as follows: "If, as has often been said, Christianity is part of the common law of the several States, and if the U. S. in their legislative and executive departments throughout the country, since the foundation of the Government, have recognized Sunday as a day of rest and freedom from compulsory labor, then such a law as that of Ga., being based upon a public policy common to all the States, might be sustained; but, if put upon a ground now declared in the opinion of the Court in the present case, namely, as an exercise of the police power of the State, and, as such, paramount to the control of Congress in administering the commerce clause of the Con-

stitution, then it is apparent, as I think, that the decision in Hennington vs. Ga. was wrong, and the Judges dissenting in that case were right.

If, as a matter of local policy, one State may forbid Inter-state trains from running on the Christian Sabbath, an adjoining State may select a Jewish or Seventh Day Sabbath, as the day exempt from business. Another State may choose to consecrate another day of the week in commemoration of the Latter Day Saint and Prophet who founded such State, as the proper day for cessation from daily labor. Or, what is more probable, one or more of the States may think fit to declare that one day in seven is not a sufficient portion of the time that should be exempt from labor, and establish two or more days of rest. The destructive effect of such inconsistent and diverse legislation upon Inter-state commerce, carried on in trains running throughout the entire country, is too obvious to require statement or illustration."

The case has, in effect, been over-ruled by the more recent cases cited on the brief. There is no other Statute in existence like the one under review and hence no direct authority.

The Hennington case was dealing with a Statute of Ga. which requires all freight trains not to run after (8) o'clock on Sunday morning until twelve (12) o'clock that night, with certain exceptions specified. The difference between requiring the freight trains to stop running a part of one day in the week, and requiring all trains to stop at every crossing every day in the week is marked.

If the Hennington case is sound as to the Statute it was dealing with, it is not authority for upholding a Statute which both regulates and burdens commerce.

VIII.

Adjudicated cases of this court are all in line of our contention. The decision of this case by the Court of Appeals was based on a misconception of Gladson vs. Minnesota, 166 U. S. 430.

ARGUMENT.

I.

FEDERAL QUESTION PROPERLY MADE.

It is conceded that a Federal question was made. Was it properly raised?

1. Under Section 914 of the Revised Statutes of the United States, it is provided that the practices, pleadings, forms, and modes of proceeding in Civil causes, other than Equity and Admiralty causes in the Circuit and District Courts, shall conform as nearly as may be to the practices, pleadings, forms, and modes of proceeding existing at the time in like causes in the Court of Record of the State in which such Circuit and District Courts are held. This cause having been tried in the Circuit Court being held in Georgia, we must look to the law of that State as to the mode of raising such questions. The rule under the Georgia law is that, in order for a Court of Review to pass upon the constitutionality of an Act of the Legislature, the Act must be brought into question in the Trial Court and passed on by the Judge thereof, either directly or by implication. It must appear in the record that the question was before the Trial Judge and he passed on it, or should have passed on it.

Savannah, Fla. & Western Ry. Co. vs. Hardin, 110 Ga. 433.
Brown vs. State, 114 Ga. 60.
Sayr vs. Brown, 119 Ga. 542.

2. When a constitutional question is not made or

passed upon in the lower Court, the Court of Review will not consider it, though afterwards argued there. The reverse of the proposition is also true.

Butler vs. Merritt, 113 Ga. 241.
Lafitte, et al vs. Burke, 113 Ga. 1000.
State vs. Henderson, 120 Ga. 781.
Newkirk vs. Southern Ry. Co., 120 Ga. 1048.
Parham & Co. vs. Potts-Thompson Liquor Co., 127 Ga. 303.

These cases comprise all the recent expressions of the Supreme Court of Georgia on the subject. The Amendment filed by the defendant and already set out, it will be seen, contains none of the defects mentioned in these cases. It sets out the Georgia Statute, of which it complains,and the clauses of the Federal Constitution which, it is alleged, it contravenes, and why.

3. If the Amendment, filed and stricken, was germane and in proper form, the question was probably made. The law of Amendment to pleadings in Georgia is exceedingly liberal. Either plaintiff or defendant may amend at any stage of the case, in form or substance, if there is anything to amend by. In the case at Bar, the defendant had filed an answer at the first Term, denying the allegations of plaintiff as to liability which was the general issue in effect. The Code of Georgia, of 1895, Section 5097, on the subject of Amendment, provides: "All parties, whether plaintiffs or defendants, in the Superior or other Courts, whether at law or in Equity, may, at any stage of the cause, as matter of right, amend their pleadings in all respects, whether in matter of form or of substance, provided

there is enough in the pleadings to amend by. The defendant, after the first Term, cannot set up new matter by way of Amendment, except as provided in Section 5057."

The Code, Sec. 5098, has undertaken to codify the principle announced in a number of decisions, including the case of Ellison vs. Georgia, Florida, Ry. Co., 87 Ga., 691, and is in these words:

"A petition showing a plaintiff, and a defendant, and setting out sufficient to indicate and specify some particular fact or transaction as a cause of action, is enough to amend by. The jurisdiction of the Court may be shown, and the details and circumstances of the particular transaction may be amplified and varied by Amendment. If the declaration omit to allege facts essential to raise the duty or obligation involved in the cause of action which was evidently intended to be declared upon, the omitted fact may be supplied by Amendment."

See also Eagle & Phoenix Mills vs. Muscogee Mfg. Co., 129 Ga. 715.

The same rule applies to Amendments by the defendant, as to his plea or answer, that applies to the plaintiff.

Roundtree vs. Rutherford, 65 Ga., 447.
Winn vs. Winn, 109 Ga., 255.

The only difference between an Amendment filed by the plaintiff and that filed by the defendant is the requirements of the Statutes as to an affidavit. The Code of Georgia of 1895, Section 5057, as amended by the Acts of 1897, Page 35, is as follows: "The defendant, after the time allowed for answer has expired, shall not, in any case, by Amendment, set up any new

facts or defense, of which notice was not given by the original plea or answer, unless at the time of filing such amended plea or answer containing the new matter, he shall attach an affidavit that, at the time of filing the original plea or answer, he did not omit the new facts or defense set out in the amended plea or answer for the purpose of delay; or unless, in the discretion of the Court, the circumstances of the case or substantial justice between the parties require that such Amendment be allowed without attaching an affidavit."

If the proper affidavit is attached, the Judge has no discretion, but must allow the Amendment.

Winn vs. Winn, 109 Ga. 256.
Ala. Midland Ry. vs. Guilford, 114 Ga. 628.

The Judge, in his discretion, may allow the Amendment without affidavit.

Marsh vs. Hicks, 110 Ga. 888.

The absence of the client is a reason for allowing the Amendment without an affidavit.

Boss vs. Guarantee City Co., 119 Ga. 127.

In this case, however, the affidavit was, in fact, made to the Amendment by the Counsel in charge of the case. (See Page 29 of the Record.) It will be observed that the Statute does not require an affidavit to be made by the defendant, but merely an affidavit.

In this instance it was done by the person who best knew the facts. In Georgia, an attorney may make an affidavit to an Amendment, or, indeed, to any pleading,

for a defendant who resides out of the County where the case is being tried.

Paullain vs. Pigg, 66 Ga., 263.

An Agent may make an affidavit. Code of Ga. 1895, Section 3035.

The Demurrer to the amended answer was upon the ground that it did not set up a legal defense and, therefore, necessarily waived any question as to form.

II.

QUESTION RAISED BY EVIDENCE.

The question was again raised by the evidence of Dewberry, as to the number of crossings between the South Carolina Line and Atlanta, and the time it would take to observe the Statute. (See Page 22 of the Record.)

The Court of Appeals in deciding this case, held that the tender of this evidence did not again raise the question. The learned Judge, in speaking of this evidence, says: "The only object and avowed purpose of tendering this testimony was to show the invalidity of the Statute, in so far as it related to trains engaged in Interstate traffic, and this, without special plea, would not be permissible under the practice and pleading obtaining in Georgia.

* * * * * *

The validity or invalidity of a Statute cannot be considered upon Appeal, unless the Record shows that the question was distinctly raised in the pleadings in the Court below."

The two cases cited by the learned Judge in support of the propositions are those of Parham & Co. vs. Potts-Thompson Liquor Co., reported 127 Ga. 303, and the case of the Savannah, Fla., & Western Ry. Co. vs. Hardin, 110 Ga. 433. The Parham & Co. case is a head-note decision, and the only reference to the question under consideration is in the first head-note, which is in these words: "An averment in a pleading that a named Statute is unconstitutional and void, is too vague and indefinite to raise any question for determination." This does not deal with the proposition as to how the question shall be raised but simply decides what is not a sufficient raising. The case of the Savannah, Fla., & Western Ry. Co. is dealing solely with the question as to whether or not the constitutionality of the Statute may be brought in question by Demurrer. The learned Judge who wrote that opinion was on the Bench and wrote the opinion in the case of Newman vs. State, 101 Ga. Page 534. In that opinion he used this language: "Under a general Demurrer, the constitutionality of the law under which the accused was arraigned was brought in question."

This evidently was going too far. Indeed, the same learned Judge writing the opinion as wrote the opinion in the Newman case, in the course of his argument, uses this expression: "These statements in the Bill of Exceptions will not be sufficient to raise the question when the Record shows that the question was not distinctly raised in the pleadings in the Court below." In that case, the only way it could have been raised was by the pleadings.

Counsel was insisting that the general Demurrer without more, had sufficiently raised it, and that statements in the Bill of Exceptions saved it. It was with this question the Judge was dealing and, while it is authority, to the effect that a constitutional question cannot be raised by a general Demurrer which makes no reference to the question, it is, by no means, exhaustive nor authority that the question cannot be raised except by pleading.

As an evidence that the learned Judge did not mean to confine an attack upon a legislative Act to the pleading, I quote from the decision rendered by the same Judge in the case of Lafitte vs. Burke, 113 Ga., page 1001, as follows: "No Court should ever pass upon the constitutionality of a Legislative Act, unless the *Record* indicates clearly, and specifically points out the reason why the Act is claimed to be unconstitutional." The word *Record* is broader and not only embraces the pleading but anything that might happen in the case.

Under the Georgia practice a plaintiff files no pleading except his declaration, but if the defendant should set up a defense by virtue of an unconstitutional Statute, a plaintiff would attack the same by oral Demurrer, or by objecting to evidence. The case would go to the Supreme Court with these facts appearing in the Bill of Exceptions, or in the Record made up, and the rules of the law would be complied with. If it were true that the unconstitutionality of an Act could not be brought in question, except by pleading, it would follow that in Georgia a plaintiff could never question an Act relied

on by the defendant. It is necessary that the question be raised in some legitimate way and passed on by the Trial Judge, and that this fact appear, before the record of it can be reviewed by the Appellate Court. There is no reason why this cannot be done as well by the Demurrer to evidence as any other way.

The only thing decided in the Savannah, Fla. Ry. case, above noted, is embraced in the first head-note, and is in these words:

"When a record brought to this court contains nothing from which it could even be inferred that any question of the constitutionality of a particular Statute upon which the plaintiff's action was based, was at any stage of the case made in the Trial Court, or that such Court, in any manner, undertook to pass upon such a question, the mere fact that the Bill of Exceptions assigns error upon a refusal to sustain a general Demurrer to the petition and dismiss the action, and also upon the over-ruling of the motion for a new trial containing a ground alleging that the verdict was contrary to law, does not properly raise here any question upon the constitutionality of such Statute; and this is so, though the Bill of Exceptions does in general terms state that the above indicated rulings were erroneous because that Statute was "class legislation and special legislation and obnoxious to the Constitution of the State, and therefore void' and requires 'impossibilities and puts as a penalty the value of the goods lost, and takes the property of defendant without any just compensation therefor, and, therefore, amounts to confiscation which is unconstitutional and void."

While a private conversation does not amount to authority, yet it is at least permissible to state that Judge Cobb, who delivered these opinions, states now that he

did not intend to hold that the only way a constitutional question could be raised was by the pleading.

The evidence, when offered, was not objected to on the ground that there was no pleading to sustain it. The objection was (See page 22) : "I object to that question and to the answer, because indefinite, immaterial, and inadmissible. I think the entire case should be confined to these crossings."

It is a well settled rule under the Georgia practice, that all objections to evidence, not made, are waived. The objection must be made at the time the evidence is offered and the grounds thereof stated.

Jackson vs. State, 88 Ga., 784.
Steed vs. Cruise, 70 Ga., 168.
Christian vs. State, 86 Ga., 430.
Reinhart vs. Blackshear, 105 Ga., 799.
Summers vs. State, 116 Ga., 535.

Thus, as the question was presented to the Trial Judge, as to whether or not the evidence was admissible, it was the same as if pleading was then of file, authorizing the evidence, and in excluding the evidence, the Judge was passing upon a question as to whether or not the Blow Post Statute was constitutional. An exception was allowed to the Judge's ruling, and it became part of the Record, and under the ruling made by the Supreme Court of Ga. in the cases above cited, the question was proper to be considered by the Court of Review.

We insist, therefore, that the Federal question was made in the two ways mentioned. The Trial Judge in his charge to the jury, recognized that the question had

been made by the evidence when he charged the jury as follows: "Under the Statute of Georgia, Gentlemen, which has been referred to, it is the duty of the engineer of trains in Georgia, when approaching a crossing, to blow the whistle as has been stated by you, and to check and keep checking their trains as they approach the crossing, so as to be able to stop them, if any person or thing should be upon the crossing. That is the Statute of this State, and it is entirely clear that they were not doing that in this case, so there is no question that the Railroad, through its servants, and employes, was guilty of negligence.

I, therefore, charge you, as a matter of law, that the defendant, through its servants, Agents and employes, was guilty of negligence."

III.

COMMERCE, WHAT IS.

That an Inter-state railroad carrying passengers, mail and express, is an instrumentality of commerce and protected by the commerce clause of the constitution is too well established by the authorities cited on the brief, as well as others, to admit a question. Whatever rule applies therefore to Inter-state commerce, under the law, applied to the train of the railroad company being run at the time the injury under consideration occurred.

IV.

THE APPARENT LEGAL EFFECT UPON INTER-STATE COMMERCE IS BY VIRTUE OF SOME OTHER RESERVE POWER.

While under the police powers reserved in the states, and giving the states the authority to enact such laws

as may be necessary for the protection of the public morals, public health, and public safety, these powers must be exercised so as not to affect Inter-state commerce or the instrumentalities thereof; otherwise, they are void.

The right to regulate commerce cannot exist both in a state and in the Federal Government. When the right was ceded to the Federal Government the whole right and not a part thereof was so ceded. The only thing reserved by the state in so far as commerce and its instrumentalities are concerned is the right to enforce the common law duties imposed upon such instrumentalities of commerce. While there is no common law of the United States, yet in most of the States, it exists. The duty imposed by common law on a carrier whether Inter-state or Intra-state, must be performed, and a State can enforce that performance. In each instance where a State Statute apparently affecting the instrumentalities of Inter-state commerce has been upheld by this court, such Statute was merely declaratory of the common law duty owed by the railroad.

Mr. Elliot in his work on Railroads, Vol. 3, page 1156, in discussing the common law duties of a railroad company at crossings, says: "The company must exercise reasonable care to provide sufficient men and proper appliances for the control of the train; must when necessary provide suitable warnings of danger at highway crossings, and on the approach of trains to crossings, warnings must be given which will apprise the traveler in the use of ordinary care, of the danger of the situation. The signals must be given at such a time and the

speed of the train so regulated that the warning may be effectual to the traveler to whom the duty is due."

This common law duty to give notice of the approach of the crossing may be declared by Statute, that is to say, a State may declare what will constitute a compliance with this common law duty; and hence that part of the Statute under consideration which requires the whistle to blow four hundred yards before reaching the crossings, is a mere statutory declaration of what shall constitute a compliance with a common law duty.

It is likewise a common law duty of a carrier to exercise ordinary care in passing populous localities and to regulate the speed of the train accordingly. It is therefore within this power for the States to provide the speed of the trains through cities. This is a mere statutory declaration of what shall be a compliance with the common law duty of running at a safe speed through places frequented by the public.

It is likewise a common law duty for carriers to stop sufficient trains at the various stations to accommodate the traveling and shipping public, and hence the Statute requiring three trains each day to stop at towns having a population of three thousand, is a mere statutory declaration of what is a compliance with this common law duty.

In other words, wherever there is a common law duty of a carrier, the State may prescribe what shall be a compliance with that duty, but when it imposes a duty not embraced in those under the common law, in so far

as it affects the instrumentalities of Inter-state commerce, the same is void.

There is nothing under the common law requiring a carrier to stop its trains at road crossings. When the State of Georgia undertakes to require an Inter-state train to stop at each crossing, regardless as to whether or not there are persons thereon, it is dealing with a duty not imposed under the common law, a right therefore not reserved in the State.

Under the common law, the duty is on the traveler to look and listen for the approach of a train before crossing. The Statute under consideration reverses the rule and in effect requires the railroad to look and listen and to stop.

Under the Statute, the traveler is not required to stop, but he may proceed on his way, and the train must stop until he passes.

Mr. Cooke in his work on Commerce Clause of the Federal Constitution, Pages 112 to 124, inclusive, lays down the rule as above stated and among other things says:

"When it is apparent that a State is regulating Commerce, the power being exercised is derived from some other authority, which power has been reserved in the State. Assuming then as well established, the rule that, under certain conditions at least, the power of Congress to regulate is exclusive of any exercise of such power under authority of a State, even in the absence of exercise of the power by Congress, there arises the question whether it is not exclusive *in all cases*. We submit that it is, and for a time, at least, such view obtained some counte-

nance. That is to say, in this view, strictly speaking, *in no case can Commerce within the scope of the Commerce clause be regulated under authority of a State.* It is true indeed, that action taken under authority of a State may effect such Commerce, but we submit that *in every case this is merely the incidental result of the exercise under authority of a State, not of the power to regulate Commerce, but of some other distinct power reserved to the States.* 'All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from *distinct powers*; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.' We shall endeavor hereafter to demonstrate the application of this principle in detail; an illustration will suffice here. Either Congress or a State may take action with reference to the transportation of diseased live-stock from State to State, and in their outward aspect there may be no distinction between action in one case and in the other. But Congress is *directly regulating the transportation of such live-stock*; the State is *directly regulating the sale* thereof, within its limits, prohibition of such transportation from State to State, being merely an essential incident of the regulation of sale within the State.

It must be admitted, and will, indeed, hereafter be seen that there are decisions of the Supreme Court not in harmony with the distinction just stated, but it would seem to us to be better to regard them as departures from sound principle than to manufacture a new and arbitrary distinction for the purpose of explaining them." (Cooke on the Commerce Clause, Pages 111-113, inclusive.) (See, also, Pages 113-124, Cooke."

"The principles of the common law are operative upon all Inter-state commercial transactions, except as

far as they are modified by Congressional enactment." Western Union Tel. Co. vs. Call Pub. Co., 181 U. S. 92 (45 L. E. 765.)

V.

THE POLICE POWER OF A STATE.

If the authority to enact the Statute under consideration was reserved in Georgia by virtue of its police powers, still, this power is not unlimited, and is subject to judicial review, and when exercised in an arbitrary or oppressive manner, such law may be annulled as violative of the rights protected by the Federal Constitution.

In the case of Jacobson vs. Massachusetts, 197 U. S., page 25, Mr. Justice Harlan delivering the opinion, uses this language: "A local enactment or regulation even if based on the police powers of a State, must always yield in case of conflict with the exercise by the Government of any power it possesses under the Constitution, or with any right which that instrument gives or secures."

In the case of Lawton vs. Steel, 152 U. S., 133, the court uses this language: "The extent and limits of what is known as the police power have been a fruitful subject of discussion in the Appellate Courts of nearly every State in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance * * * * To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a

particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive but is subject to the supervision of the courts."

Henderson vs. New York, 92 U. S., 259.

In the case of Lochner vs. New York, 198 U. S., 45, in discussing a New York Statute limiting he hours of labor of employes in bakeries, etc., this language is used. "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be * * * In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty etc. * * * This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it

within the police power of the State? And that question must be answered by the court."

In the case of Holden vs. Hardy, 169 U. S., 366, the rule is stated: "The question in each case is whether the legislature has adopted the Statute in the exercise of a reasonable discretion or whether its action be a mere excuse for an unjust discrimination or the oppression or spoliation of a particular class."

In the case of Connolly vs. Union Sewer Pipe Company, 184 U. S., 540, Mr. Justice Harlan delivering the opinion, uses this language: "The question of constitutional law to which we have referred cannot be disposed of by saying that the Statute in question may be referred to what are called the police powers of the State, which, as often stated by this Court, were not included in the grants of power to the general government, and therefore reserved to the States when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the constitution or Statutes of the States to the contrary notwithstanding, a Statute of a law, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a State enactment, whatever may be the course from which the power to pass such enactment may have been derived. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the Supreme law. The State has undoubtedly the power, by appropriate legislation, to protect the morals, the public health and the public safety, but if, by their necessary operations, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

Gibbons vs. Ogden, 9 Wheat 1, 210; Sennot vs. Davenport, 22 How. 227; Missouri, etc. Railroad Company vs. Haber, 169 U. S., 613

In the case of Dobbins vs. Los Angeles, 195 U. S., 223, the rule is thus stated: "But the exercise of the police power is subject to judicial review and property rights cannot be wrongfully destroyed by arbitrary enactment."

In the case of McLean vs. Arkansas, 211 U. S., 547, the doctrine is thus stated: "The police power of the State is not unlimited and is subject to judicial review, and when exercised in an arbitrary or oppressive manner, such laws may be annulled as violative of the rights protected by the Constitution."

The same principle has been announced in a number of other cases, but these are sufficient to establish the proposition that granting the Statute under consideration is within the police powers and the reserved right of the State of Georgia, yet if the Statute at the same time is oppressive or is unreasonable or is a burden upon the rights granted under the Federal Constitution, the same shall be declared void.

Assuming the rule to be that any act of a State whether direct or otherwise has the effect to materially interfere with Inter-state commerce, this Court will declare the same void; what are the facts as applied to the case under review? The demurrer filed to the amended answer admitted everything alleged therein; among the rest, it admitted that it was impossible to do an Inter-state business and at the same time comply with the terms of the Statute under review. This being admitted,

it would seem to follow that under the authorities the Statute could not be upheld as applicable to Inter-state commerce.

From the Record it is apparent that from the S. C. line where the train reached the Ga. line to Atlanta, was a distance of about one-hundred (100) miles with an average of a crossing to the mile. That it would take an average of seven (7) minutes to the crossing to observe the statute under review, or seven hundred (700) minutes for that journey. The schedule time for that train from the S. C. line to Atlanta, was about three (3) hours and a half, or the total time to run a train one hundred (100) miles under the Statute would be fifteen (15) hours, making an average of a little over six miles per hour. This Statute, in effect, therefore, requires an Inter-state railroad to run its trains in Ga. at a speed of six (6) miles per hour. If the Statute under review had enacted in so many words that a train should not run in Ga. beyond six (6) miles per hour, I take it that this Court would not hesitate to declare the same an unreasonable exercise of the police power of the State. It has been frequently held by this Court, and the doctrine reiterated in the case of the railroad commissioners of N. C. cited on the brief, that any exercise of state authority in whatever form manifested which directly regulates, or the necessary effect of which is to regulate Inter-state commerce, is void. (See also Atlantic Coast Line R. R. Co. vs. S. C. Commission decided Dec. 9, 1907.)

If, therefore, the State could not regulate the speed of an Inter-state train by reducing it to six (6) miles an hour, and I think that will be conceded, I submit that a Statute which has that effect, likewise cannot be sustained under the police power of the State.

It is claimed that the Statute under consideration was enacted for the public safety, under the reserve power of the State to enact such laws as may be necessary for the safety of the public. When analyzed, it will be seen that it does not apply to the whole public; it is only to that small per cent of the public that may use the road crossings. It does not apply to all those, in fact, but simply to that per cent of persons traveling upon the dirt road who violate the duty imposed on them by the common law of looking and listening before crossing a railroad track. This per cent being so small, as compared to the public at large, it would be an unreasonable regulation, and an unreasonable burden upon the Inter-state carrier to require that it is to run its trains in such way as could not exceed six (6) miles an hour, for the sake of this small per cent of the careless public.

The ceded powers to the general government, while few in number are plenary in extent. To regulate commerce among the several States was one of the ceded powers. When Congress saw fit to authorize railroads to form continuous lines through the several States for the purpose of doing an Inter-state business, every obstacle in the way of exercising this conferred authority

was, thereby, legally removed; the State was powerless to prevent a foreign railroad train from entering its borders; the power it once had as to a train had been given up to the general government. If it could not prevent a train from entering its borders, it could no more regulate the train after entering them.

So far as Inter-state commerce was concerned, and the instrumentalities thereof, State lines were wiped out; the strong arm of the Federal government extended to all points therein, protecting its creatures, that is, the instrumentalities of Inter-state commerce from interference with the free exercise of the authority conferred.

When the Southern Railway, by virtue of this Act of Congress started its train through Ga., no State line was recognized by the general government, and a train had the same right to run in Ga., regardless of the Statute as it did to run in a State without such Statute.

VI.

THE REASONS WHY THE STATUTE IS VOID.

1. There is no common law duty on the carrier to check his train at a crossing to the extent of stopping if any person or thing shall be on the crossing, and there is no reserve power in the State to impose such burden on the Inter-state carrier. The Act under review is statutory and contravenes the common law.

2. The Act as applied to Inter-state trains, is unreasonable. It was said in the case of L. S. & M. S. Ry. Co. vs. State of Ohio, 173 U. S. 301. "The reasonableness or unreasonableness of a State enactment in a given case, will determine whether or not the same is the proper exercise of police power." It is apparent from the brief, that a train observing the Statute under review, would be reduced to six (6) miles an hour; yet if one State enact such a regulation, so could all and the effect would be to reduce fast trains, competing with each other, to a gait equal to the stagecoach of our ancestors. It is easy to see how an Inter-state railroad would be hampered in competing with a rival road, one going through Ga., and the other not. The roads of equal length could not carry passengers in the same time if one had to linger for a hundred miles through Ga., at the rate of six (6) miles an hour, while its competitor was running fifty (50) miles or more. The Act, therefore not only regulates the instrumentalities of commerce when in Georgia, but regulates the same in its whole trip and in procuring business and passengers. It is, therefore, an unreasonable regulation and void.

3. The Act in effect is to regulate Inter state commerce, and the instrumentalities thereof; whereas, the same can only be done by Congress. In the case of Brown vs. Houston, 114 U. S. 622, it is said: "So long as Congress does not pass any law to regulate commerce among the several states, it thereby indicates its own will that such commerce shall be free and un-

trammelled and any regulation of the subject by the state is repugnant to such freedom."

4. The effect of the Statute under review, is to *burden*, *impede*, and to *impair*, the usefulness of the facilities of Inter-state commerce for such traffic. In the case of the Ill. Cent. R. R., 164 U. S., cited on the brief, the rule is announced that if a Statute had the effect to do either one; that is to say, if it was a burden upon, or had the effect to *impede*, or had the effect to *impair* the usefulness of the facilities of an Inter-state carrier, such Act would be void.

5. The Statute is not observed. The Criminal Court of Georgia makes it a misdemeanor for an engineer to fail to observe this Statute, and yet it is violated thousands of times every day in the year, and no prosecution, unless some one is injured. The public recognizes that it is a law which cannot be observed. Surely a Statute so uniformly recognized as obselete, should not be held valid. The Statute was passed before the days of Inter-state railroads; indeed, it was passed at a time when there were but few railroads of any kind, and before they ran even on a schedule. The Act violates no provision of the State Constitution, but it was recognized by the Supreme Court of Ga., more than once as obselete. When the Act was passed, railroad trains made their trips like stage-coaches; the State regulated their action at crossings which, at the time, was little burden. A train running eight (8) or ten (10) miles an hour, by

schedule, could observe that Statute with little inconvenience. Business interests, competition, and rapid transit, have all developed in the State, but the Statute did not evolve with it. Inter-state commerce made its appearance, which was neither contemplated nor provided for, when the Statute was passed. While the State has not seen fit to abolish the Act by the legislature, the great public has abolished it by its demand upon the railroads, and the railroads, in turn, have ignored it in compliance with that demand. It now only serves the purpose of enabling the careless to recover, in alleging its violation as an act of negligence.

VII.

THE QUESTION PASSED ON IN GEORGIA.

The question made has never been passed on by the Supreme Court of Ga., until recently, in the case of the So. Ry. Co. vs. Grizzle; that decision is a head-note decision, reported 131 Ga., 287, and is copied in the brief in this case. It will be observed the decision is predicated upon that of Hennington vs. State, 163 U. S., 299. The Hennington case, at best, is of doubtful soundness. Mr. Justice Brewer took no part in the decision; the Chief Justice and Mr. Justice White dissented. The decision has since been criticised by Mr. Justice Shiras, in the L. S. & M. S. R. R. vs. the State of Ohio, 173 U. S., 309. The Hennington case, I think, in effect,

has been over-ruled by the more recent cases, and especially the Miss. Commission case, and the N. C. Commission case cited on brief.

Granting, however, that the Hennington case is sound, it is still not authority for upholding the Statute under review; the difference between requiring the freight trains to stop at eight (8) o'clock Sunday morning and remain still until twelve o'clock that night, which was the statutory requirement being considered in the Hennington case, and requiring *all* trains to stop at *every* crossing *every* day, is marked. Apply the rule of reasonableness, to the two Statutes, and it might be said that it was a reasonable regulation, for the State to require freight trains to suspend operation a part of the day on Sunday, and yet it would be unreasonable to require every train, both freight and passenger, to practically run six (6) miles an hour at all times, and everywhere.

The question was never passed on by the Supreme Court of Ga. until after the case at Bar had been tried in the Court below. That decision, however, is not controlling on this Court; the construction of the Statute, by the Supreme Court of Ga. is binding, but whether or not the Statute, as construed, constitutes a burden upon Inter-state commerce is a question that this Court will decide for itself. 118 U. S. 356.

That the Statute under considerstion is a burden has been recognized by the Supreme Court of Ga., in the

case of Central R. R. Co., vs. Hall, 109 Ga. page 69, when the Chief Justice delivering the opinion says: "We agree with the learned counsel that this law which requires trains to check and keep checking when approaching a crossing is a hard one, and that it is impossible for the railroads of the country to transact the business of the country and obey it. It was passed about fifty (50) years ago, before the people appreciated the necessity of rapid transit in travel and in freight. If the law was duly obeyed by the locomotive engineers, I am informed that it would take twelve (12) hours or more to run a passenger train from Atlanta to Macon, a distance of about one hundred (100) miles. Still it is the law of the land and the Courts must enforce it, however hard it may work upon the business interests of the country, if it should be observed, or upon the railroads when they violate it."

The Chief Justice of Ga. using this language was dealing with the Statute as applied to the Intra-State road. They furnish however the judicial information that the Statute, itself, violates the commerce clause of the Federal constitution. The Statute and this decision, giving the effect of it, furnished the evidence that the Statute is a burden upon Inter-state commerce.

An Inter-state carrier must either obey the Statute and thus be unable to do the business of an Inter-state carrier, as was alleged in the amended answer and admitted by the demurrer, or it must do the business in violation of of the Statute, and be held responsible for any injury that may result. When Congress authorized the So. Ry. Co. to do an Inter-state business, and to compete with other Inter-state carriers, surely it did not contemplate that it should take either horn of such a

dilemma as this. It contemplated, rather, that such a barrier would be removed by the Courts, if the same should get in the way.

VIII.

ADJUDICATED CASES.

The Statute under consideration is peculiar to Ga. I have found nothing like it any where else, nor have I ever been able to find an authority dealing directly with the question made. In a number of States, Acts have been passed with reference to railroad crossings. In Conn. (Conn. Statute, Section 3489) authority is given on proper case made, to require a grade crossing removed at the joint expense of the railroad and County. This was held a reasonable exercise of the police power of a State, in the case of the town of Westbrook, Conn. (57 Conn. report 95.)

The State of Iowa Statute, Par. 2072, requires all trains to have their engines blow their whistles sixty (60) rods before reaching a crossing and to ring a bell until the crossing is passed, except in the city, where they are required only to ring the bell. The State of Mass., (Revised Laws, Chapter III, Par. 188,) provides for the ringing of a bell and blowing the whistle of engines approaching a crossing. The State of Penn., in 1871, passed an Act, in effect prohibiting grade crossings under certain conditions. This Act was upheld, in the case of Penn. R. R. Co. vs. Braddock Electric Railroad Co., 152 Penn. State, 116.

In the case of Toledo etc. Railroad Co. vs. Jockinson, 67 Ill., 37, the Supreme Court of the State of Ill. held that the Statute of Ill. requiring railroads to keep a flagman by day and a red light by night, at crossings, was an unreasonable burden upon Inter-state commerce and should be held unconstitutional. A number of other Statutes are found requiring railroads to signal their approach to crossings, but none requiring a train to check. A number of cases are found prescribing the duty of a railroad train going through a thickly populated community, to run at such speed as to be safe to travelers, and, in conformity with City ordinances, limiting the speed to a given number of miles an hour, which have been held reasonable on account of the populous condition of the city.

Mr. Elliott, in his work on Railroads, Vol. 2, Par. 668, uses this language: "The authorities are agreed that when the trains move upon, or across, highways their speed may be regulated, but there is a contrariety of opinion as to whether the speed of trains operating exclusively upon the private property of the company can be limited."

He cites as authority to support this text a number of State cases, but so far as I have been able to find they have all dealt with intra-railroads and the question at bar was not involved. A kindred question and the principle has been before the U. S. Supreme Court several times.

In the case of Ill. Central R. R. Co. vs. Ill., 163 U. S., page 154, it was held that an act of the State of Ill.,

requiring all trains to stop at the town of Cairo was an unreasonable exercise of police power of the State as applied to Inter-state railroads.

In the case of Gladstone vs. Minnesota; 166 U. S., page 431, it was held that the doctrine announced in the 163d U. S., above quoted was not applicable because the road in question was an Intra-state railroad.

In the case of Lake Shore & Michigan Southern Ry. Co. vs. State of Ohio, reported in the 173d U. S., page 285, it was held that a Statute requiring three trains each way to stop at each town of 3,000 inhabitants daily was a reasonable exercise of the police power. I call attention of the Court to the dissenting opinion of Mr. Justice Shiras found on page 309 of the report, which goes into the authorities pertaining to the case; and likewise the opinion of Justice Brewer, White, and Peckham concurring in this dissenting opinion contained on page 335.

The case of Cleveland, Chicago, Cincinnati & St. L. R. R. Co., reported in 177 U. S., page 514, the head note is as follows:

"The requirement that all regular passenger trains must stop at County seats, which is made by the Illinois Act of March 21, 1874, constitutes a direct burden upon Inter-state commerce in violation of the U. S. Constitution, so far, at least, as that Statute requires through Inter-state passenger trains to stop at such station when adequate train service has been provided for local traffic."

This case takes up a number of cases cited. It quotes from Mr. Justice Gray, as follows:

"The State may doubtless compel the railroad com-

pany to perform the duty imposed by its charter of carrying passengers and goods between its termini within the State. But so long, at least, as that duty is adequately performed by the company, the State cannot, under the guise of compelling its performance, interfere with the performance of paramount duties to which the company has been subjected by the Constitution and laws of the United States."

This case further calls attention to the fact that that of Gladson vs. Minnesota, above cited, is upheld upon the ground that it was dealing with an Intra-State railroad.

It further calls attention to the fact that the case above cited in the 173 U. S., page 285, can be upheld upon the grounds that it only applies to three trains running each way each day and leaves a loophole for through trains.

Mr. Justice Brown, in delivering the opinion of the Court in 177 U. S., above cited, uses this language:

"It is evident that the power attempted to be exercised under this Statute would operate as a serious restriction upon the speed of trains engaged in Inter-state traffic, and might, in some cases, render it impossible for trunk lines running through the State of Illinois to compete with other lines running through States in which no such restrictions were applied. If such passenger trains may be compelled to stop at County seats, it is difficult to see why the legislature may not compel them to stop at every station,—a requirement which would be practically destructive to through travel, where there were competing lines unhampered by such regulations. While as we held in the Lake Shore case, railways are bound to provide primarily and adequately for the accommodation of those to whom they are directly tributary, and who not only have granted to them their franchise, but who may have contributed largely to the construc-

tion of the road, they are bound to do no more than this, and may then provide special facilities for the accommodation of through traffic. We are not obliged to shut our eyes to the fact that competition among railways for through passenger traffic has become very spirited, and we think they have a right to demand that they shall not be unnecessarily hampered in their efforts to obtain a share of such traffic. It is evident, however, that neither the greater safety of their tracks, the superior comfort of their coaches or sleeping berths, nor the excellency of their tables, would insure them such share if they were unable to compete with their rivals in the matter of time. The great efforts of modern engineering have been directed to combining safety with the greatest possible speed in transportation, both by land and water. The public demand this, the railway and steamship companies are anxious in their own interest to furnish it, and local legislation ought not to stand in in the way of it." "While the Statute in question is operative only in the State of Illinois, it is obnoxious to the criticism made of the Louisiana Statute, in Hall vs. DeCuir, 95 U. S., 485, that 'while it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct, to some extent, in the management of his business throughout his entire voyage. If each State were at liberty to regulate the *conduct* of *carriers* while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight regardless of the interest of others."

The principle above announced with reference to the Statute requiring each train to stop at each county seat would doubly apply to a Statute that required each train to stop at each public crossing. If stopping once in each county, many miles apart, is a burden, what is to be said

of a Statute requiring the train to stop once each mile?

Applying this rule to the evidence in the case and it seems there can be no doubt of the effect of the Statute. As stated, for the purpose of the demurrer it was admitted that the railroad could not carry on its business in consequence of the necessary delay, if required, to comply with this Statute.

Another view of the operation and effect of the Statute is worthy of consideration. The Statute was enacted in 1852, at a time when there were no Inter-state railroads and very few others in Georgia. There is not a road in the State which attempts to comply with the Statute. While the act provides that the engineer who fails to observe the same is guilty of a misdemeanor, no engineer has ever been prosecuted for such violation, except where some special damage case rendered it necessary. It is a Statute therefore enacted at a time when Inter-state railroad companies did not exist. It is recognized by the railroads themselves as inoperative. The public demands a speed that cannot be obtained and observe this Statute. The public fail and refuse to prosecute the engineer violating the Statutes hundreds of times every day, because doubtless they realize its hardship. Such a Statute when it is apparent that if enforced it would break up Inter-state railroad business; that it would prevent the mails from being carried, and render it impossible for an Inter-state road to comply with the requirements of the Inter-state railroad commission, as well as the State Commissions, the same should be declared void.

As was said by the learned Judge, who delivered the opinion in this case in the Circuit Court of Appeals:

"The question of the validity of the State Statutes and orders of State railroad Commissions directing the stoppage of through Inter-state trains have frequently, within late years, been before the Supreme Court of the United States. One of the recent cases is that of Mississippi Railroad Commission vs. Illinois Central 203 U. S. 335, and Atlantic Coast Line Railroad vs. North Carolina Commission, 206 U. S. 1. The late declaration by the Supreme Court is found in the opinion rendered Dec. 9, 1907 in Atlantic Coast Line Railroad vs. South Carolina Commission, in which Mr. Justice Peckham speaking for that tribunal uses the following language:

"'That any exercise of State authority in whatever form manifested, which directly regulates Inter-state commerce is repugnant to the commerce clause of the Constitution, is obvious. It hence arises that any command of a State, whether made directly or through the instrumentality of a railroad commission, which orders, or the necessary effect of which is to order, the stopping of an Inter-state train at a named station or stations, if it directiy regulates Inter-state commerce, is void.'"

The case of Gladson vs. Minnesota, 166 U. S. page 430, upon which the Court below rests, its decision was dealing with an Intra-state railroad, and the question decided in that case, I respectfully submit, so far from being authority against my contention, is in support of it. In that case the railroad in question was chartered by the State of Minnesota; it had its franchise from that State. While it connected with other roads, it was doing purely an Intra-state business. It was amenable to the power that created it. It took its fran-

chise with a burden of obeying the conditions upon which it was created. In the case at Bar the Southern Railway Company was a foreign corporation, chartered by the State of Virginia, and was operating in Georgia by virtue of the authority of an Act of Congress. While it is amenable to the laws of Georgia, the State cannot impose a burden, or in any way impede its usefulness as a means of Inter-state traffic.

In the Minnesota case, stated above, the railroad was chartered by that State. In the case at Bar, the railroad is chartered by another State.

In the Minnesota case the Railroad in question was doing purely an Intra-state business. In the case at Bar the railroad in question was doing principally an Inter-state business.

In the Minnesota case the railroad operated by the authority of that State alone. In the case at Bar the Southern Railway operated by the authority of the Federal Congress.

The idea that a State may regulate its own creature, and the reason therefor is recognized by the learned Justice delivering the opinion in the Minnesota case, where he says, on page 431, "The Legislature of the State may well treat it as one important object of establishing a railroad within the State that public officers, parties to action, jurors, witnesses and citizens generally should be enabled the more promptly to reach and leave the centers to which their duties or business may call them, to require every regular passenger train running wholly within the limits of the State to stop at all stations, at County seats directly in its course for a few

minutes and at a trifling expense, in order to take on and discharge passengers with safety, is a reasonable exercise of the police power of the State, and cannot be construed a taking of property of the company without due process of law, nor an unconstitutional interference with Inter-state commerce, or with the transportation of the mails of the United States.

The case further goes on and distinguishes it from that of the Illinois Central R. R. Co., 163 U. S. 142, by calling attention to the fact that in the latter case, was where a train was running "carrying Inter-state passengers and the U. S. Mails from Chicago in the State of Illinois, to places in other States South of the Ohio River, from an Inter-state highway, established by authority of Congress," etc.

Thus recognizing the difference between the application of the relation to an Intra-state Railroad, operating by the authority of the State, and an Inter-state Railroad, operating by the authority of Congress.

This Court, in the case of Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., 177 U. S., on page 519, in dealing with the case of Gladson vs. Minnesota recognizes the distinction that I have endeavored to point out between that and this, and in this case distinguishes the Gladson case from the one being considered as to leave it of no weight as authority.

The case of Cleveland vs. Ry. Co. 177 United States, being considered, was where a Statute of Illinois, dated March 21, 1874, requiring that all regular passenger trains must stop at County seats, was held to be a direct burden upon Inter-state commerce, and therefore void.

On page 514 this language is used: "The requirement that all regular passenger trains must stop at County seats, which is made by the Illinois Act of March 21, 1874, constitutes a direct burden upon Inter-state commerce, in violation of the United States Constitution, so far at least as that Statute requires through Inter-state passenger trains to stop at such stations, when adequate train service has been provided for local traffic."

The case clearly draws the distinction; it is dealing with a Statute requiring a train to stop at the county seat. The Gladson case, above cited, is likewise dealing with the same character of Statute in Minnesota. In this case the Statute is held a burden upon Inter-state commerce. In the Gladson case the Statute is upheld. The reason they are both upheld can only be that the one was an Intra-state train being controlled, and the other an Inter-state.

EFFECT OF STATUTE.

In the case of Morgan Steamship Company, 118 U. S. Page 455, it is said: "In all cases of this kind it has been repeatedly held that when the question is raised whether the State Statute is a just exercise of State power, or is intended by roundabout means to invade the domain of Federal authority, this court will look into the operation and effect of the Statute to discern its purpose."

Applying this rule to the evidence in the case and it seems there can be no doubt of the effect of the Statute. As stated, for the purpose of the demurrer, it was admit-

ted that the railroad could not carry on its business in consequence of the necessary delay, if required, to comply with this Statute.

Another view of the operation and effect of the Statute is worthy of consideration. The Statute was enacted in 1852, at a time when there were no Inter-state railroads and very few others in Georgia. There is not a road in the State which attempts to comply with the Statute.

It is a Statute therefore enacted at a time when Inter-state railroad companies did not exist. It is recognized by the railroads themselves as inoperative. The public demands a speed that cannot be obtained and observe this Statute. The public fail and refuse to prosecute the engineer violating the Statutes hundreds of times every day, because doubtless they realize its hardship. Such a Statute when it is apparent that if enforced it would break up Inter-state railroad business; that it would prevent the mails from being carried, and render it impossible for an Inter-state road to comply with the requirements ef the Inter-state railroad commission as well as the State Commissions the same should be declared void.

The Statute viewed from any stand-point is manifestly a burden upon Inter-state commerce. The railroads must pay the penalty of violating the Statute, or the Courts must relieve them from the burden. The Statute is a burden, and being such, this Court, under its

often repeated rulings that such a Statute cannot exist, will declare this one void.

Respectfully submitted,

JNO. J. STRICKLAND,

Attorney for Plaintiff in Error.

A. P. THOM,

HAMILTON McWHORTER,

McDANIEL, ALSTON & BLACK,

Of Counsel.

UNITED STATES SUPREME COURT,
OCTOBER TERM, 1909.

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,
vs.
JOSEPHINE KING.
NO. 140.

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,
vs.
INEZ KING, by next friend.
NO. 141.

Reply Brief for Plaintiff in Error in each case.

I.

Defendants in error insist that the amendment filed by the Railroad Co. to its answer in each of the above cases, setting up that the "Blow Post" Statutes is unconstitntional is bad, because as he says, "It fails to set out how compliance with the law interferes with Inter-state commerce, and fails to show how many such public grade crossings there were in the territory covered by this train." His proposition, in other words, is that the amendment would not have withstood a special demurrer.

The answers to his proposition are several:

1. The issue he now makes was not made in the Court

below, and a Court of review will not pass on such questions made in that Court for the first time.

2. A pleading, that for the want of particularity, would be dismissed on special demurrer, if not amended, is good as against a general demurrer.

Bryan vs. Mayor & Council of Macon. 91. Ga. 530.
The Pullman Palace Car Co. vs. Martin. 92 Ga. 161.
Blackstone vs. Central of Ga. R. R. 105 Ga. 380.
Miller vs. Merchants & Miners Co. 115 Ga. 1009.

In the case of Bryan above stated, Chief Justice Bleckley stated the rule as follows: "The declaration may be defective in form by reason of not setting out with more particularity and distinctness the position of the hole, whether at the edge of the Street, or how far inside, etc., etc., but it is good in substance and to withstand a general demurrer nothing more is requisite."

3. Admitting, for the sake of argument, that the amendment under consideration was defective in the ways suggested by counsel for Defendants in error, the amended answer was certainly amendable by supplying the number of crossings, etc., had the same been called for by special demurrer. It is a well recognized rule and often decided in the Supreme Court of Ga. that an amendable defect in pleading not taken advantage of by special demurrer, cannot be afterwards urged.

Dobbs vs. The Pyrolucite Manganese Co. 75 Ga. 450.

The head note of the case just cited says: "Although the declaration in this case was somewhat loosely drawn, yet not having been demurred to when it it might have been amended, the defect cannot afterwards be taken advantage of." The amended answer below was not objected to upon the ground that it failed to be sufficiciently explicit, but the motion to strike it or rather the general demurrer to it was upon the ground that it did not set up a legal defense. If the amendment was susceptible to the construction that there was only one crossing, being the one where the accident occurred, the Statute under consideration was a burden and impeded the train by requiring it to stop there.

II.

CASES RELIED ON BY THE DEFENDANTS IN ERROR.

1. The case of Smith vs. Alabama, 124 U. S. 465, sustaining a Statute requiri[illegible]gineers to be examined and licensed, is within the rule that the Statute is a mere declaration of what constitutes a common law duty. Besides this would in no way be a burden on Inter-State commerce.

2. The case of Crutcher vs. Kentucky, 141 U. S. 47. The quotation in defendants brief is in no sense the decision of that case. It is an argument being made by Mr. Justice Bradly, who announced the opinion, and is pure obiter. The question involved was whether or not a Kentucky Statute requiring a foreign corporation to

take out a license before doing business in that State, was a violation of the Commerce clause of the Federal Constitution and the Courts held it was.

3. The case of Lake Shore Railroad vs. Ohio 173 U. S. 285, does not establish the contention of Defendant in error. The decision was that a Statute requiring three trains a day to stop at towns containing more than three thousand inhabitants was constitutional. The reason underlying the decision being that the Railroad was at liberty to run as many other trains as it saw fit without stopping. It is the common law duty of a Railroad to furnish sufficient trains for the accommodation of the public. This Statute in effect declared that a town of three thousand inhabitants was entitled under its common law right to three trains a day each way.

It is worthy of note, however, that the Lake Shore Railroad Co. was chartered by the State of Ohio. The decision is predicated upon the ground of its being a creature of Ohio. In the fourth head note, holding the Statute legal this language is used, "and is not a regulation of Inter-State commerce and unconstitutional when applied to the trains of a corporation of the *State* engaged in such commerce."

Again in the seventh head note, this language is used, "U. S. Rev. Stat. No. 5258, authorizing railroad companies to carry government supplies, mails, etc., from one State to another, does not prevent the State from enacting such regulations with respect, at least, to a railroad corporation of its *own creation*, as are not directed against Inter-State commerce, and are not regula-

tions thereof, but only incidentally or remotely affect it, and are designed to promote the public convenience."

This decision was rendered by Mr. Justice Harlan. The recent decision of the Western Union Tel. Co. vs. Kansas, reported in the advance sheet P. 190-197, also delivered by Mr. Justice Harlan, clearly demonstrates that the Lake Shore case above cited was based on the fact that the State in its Legislative Act was dealing with its own creature.

4. The case of Gladstone vs. Minn. 166 U. S. 427, was dealing with an Intra-State Railroad, chartered by Minn., and is not applicable as pointed out in the original brief.

5. The cass of Hennington vs. Ga. 163 U. S., 300, has been fully dealt with elsewhere in the original brief.

6. The case of Erb vs. Morasch 177 U. S. 584, is sustaining a State Statute regulating the speed of trains in a city. This Statute is a mere declaration of a common law duty. If it could be said that a Statute regulating the speed of a train in a city and at a public road crossing were both covered by the police power of a State, still a Statute requiring a railroad train to reduce its speed to six miles an hour in cities in a Western State would be held reasonable, while a Statute requi-

ring a railroad to run the same speed through an entire State would be unreasonable. To slow down to six miles an hour through cities and to slow down to six miles an hour through a State is quite a different proposition.

Respectfully submitted,

JNO. J. STRICKLAND,
Attorney for Plaintiff in Error.

ALFRED P. THOM,
HAMILTON McWHORTER,
McDANIEL, ALSTON & BLACK,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM 1909.
No. 140.

Southern Railway Company,
Plaintiff in Error,
vs.
Josephine King,
Defendant in Error.

Certiorari to the
Circuit Court of Appeals of the United
States,
For the Fifth Circuit.

BRIEF FOR DEFENDANT IN ERROR.

Constitutional Questions Not Properly Made.

Plaintiff in error has not made its alleged constitutional question in a way which this Court can consider. The question sought to be made is that the Georgia blow-post law requiring railroad trains at grade crossings to blow the whistle and check in a certain manner, is an illegal attempt to regulate commerce between the States, in that it seriously obstructs the schedules of interstate trains.

The plea in vague terms, after setting forth the Commerce Clause of the Constitution, alleged "that the statute is a direct burden on and impedes the interstate traffic being done by this defendant, and impairs the usefulness of its facilities for such traffic."

Such general language as the amended answer contains fails to set out how compliance with this law interferes with interstate commerce, and fails to show how many such public grade crossings there were in the territory covered by this train; and this pleading is entirely consistent with the proposition that the grade crossing in question was the only public crossing in the territory named: and the answer fails to set forth how long a train will be delayed by checking up for these crossings and gives no data whatsoever which will enable the Court to determine whether the delay is serious or trifling.

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The Court is not bound by the mere conclusion of the pleader that the statute is a burden on interstate commerce. The railway company claims that under a certain state of facts which exist on this particular railway, compliance with this blow-post law is an unreasonable burden on interstate commerce. Ought not the facts which sustain this claim be so explicitly pleaded as to enable the Court to determine for itself whether compliance with this law is an unreasonable burden? See Parham & Co. vs. Potts-Thompson Liquor Co., 127 Georgia, 303; Newkirk vs. Southern Railway Co., 120 Georgia, 1048.

After the foregoing plea was stricken, it was not competent for the railway company to offer evidence tending to show that compliance with this law was an unnecessary burden on interstate commerce. Aside from the fact that the facts proposed to be proved were vague and indefinite, there was no pleading in the Record which justified the proof, and under the law of Georgia, pleadings must be in writing. See the decision of the Circuit Court of Appeals in the case at bar, holding that the striking of the amended answer rendered inadmissible this evidence; and see also the Georgia Code of 1895, Sections 4960 and 5049.

But in case the Court should consider the questions upon their merits, we will now discuss them.

BLURRED

INCIDENTAL EFFECT ON INTERSTATE COMMERCE DOES NOT VITIATE STATE LEGISLATION.

In Sherlock vs. Alling, 93 U. S., 99, the Court say:

"In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating upon all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution."

See also the case of Chicago, etc. R. R. vs. Solan, 169 U. S. 133, in which the Court uses the expression that police regulations by the States designed to protect persons and property in the management and operation of railroads "are rather to be regarded as legislation in aid of such commerce."

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DECISIONS RELIED ON BY PLAINTIFF IN ERROR NOT IN POINT.

Decisions in cases which deal with State legislation directly seeking to control interstate commerce are not in point here. The legislation in the case at bar is an aid to interstate commerce, not an obstruction. The decisions in the cases of Atlantic, etc. R. R. vs. Wharton, 207 U. S., 334; Mississippi Railroad Commission vs. Illinois Central R. R. Co., 203 U. S., 335; Cleveland, etc. R. R. vs. Illinois, 177 U. S., 514; and Illinois vs. Illinois, etc. R. R. Co., 163 U. S., 141, are all cases in which an attempt was made by State legislation to stop interstate trains at designated stations where the railroad had already provided reasonable local facilities, and such effort to stop through trains was held to be a direct attempt to regulate interstate commerce, and nothing else.

In the line of cases just cited, the attempt to stop all interstate trains at county seats or other stations was an attempt solely at the regulation of the schedules of the railroads. If those stations had adequate service, the State's remedy was not to require through trains to stop, but to improve the service actually given to the stations sought to be aided, and it was justly held in the cases cited that such laws were mere attempts to fix arbitrary and unreasonable schedules for railroad companies. Such laws bore no relation to the public safety, health or morals, but were purely regulations of the railroads' traffic.

CASES WHICH CONTROL THE CASE AT BAR.

Cases which control the case at bar are as follows:

Smith vs. Alabama, 124 U. S., 465, which decision sustained a statute of Alabama requiring locomotive engineers to be examined and licensed.

Crutcher vs. Kentucky, 141 U. S., 47, which decision, in showing the extent to which the State can control in the exercise of its police powers, the operation of railroads, uses the following language:

"It is also within the undoubted province of the State legislature to make regulations with regard to the speed of railroad trains in

the neighborhood of cities and towns; with regard to the precautions to be taken in regard to the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and, generally, in regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce."

Lake Shore R. R. vs. Ohio, 173 U. S., 286, in which a statute of Ohio was sustained which required every railroad company operating within the State to cause three of its regular passenger trains each way daily to stop at every village containing over three thousand inhabitants, long enough to receive and discharge passengers.

Gladson vs. Minnesota, 166 U. S., 427-430, in which a law of Minnesota requiring all trains running between points within the State, to stop at county seats, was upheld, and the Court in the course of the decision, uses the following language:

"It (the State legislature) may prescribe the location and the plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience and comfort of the passengers and of the public.

Hennington vs. Georgia, 163 U. S., 300, involved the statute of Georgia which made it unlawful to run any freight trains on Sunday, and this law was sustained as applicable to interstate trains. The effect of this law was to cause the stoppage for one-seventh of the week of all freight trains within the borders of Georgia, and it can be readily seen that the effect was much farther reaching in the way of interfering with interstate commerce than the slight checking required in the case at bar.

Erb vs. Morasch, 177 U. S., 584, involved a municipal ordinance of Kansas City, Kansas, which restricted the speed of all trains within its limits to six miles per hour, whether the same were interstate trains or interstate trains; and the objection there made that the municipal ordinance sought to and did regulate interstate commerce, was held not well founded. The Supreme Court of the United States held that

"A regulation by a city of the speed of railroad trains within the city limits is not, as to interstate trains, an unconstitutional regula-

tion of interstate commerce,—at least until Congress takes action in the matter."

The blow-post law of Georgia, instead of obstructing commerce, makes that commerce safer and more advantageous to the public. The commerce which the United States wishes to promote is not the commerce which takes or endangers human life, but is that commerce which is conducted reasonably and which promotes the public safety, health and welfare.

PRACTICAL OPERATION OF GEORGIA STATUTE.

The blow-post law of Georgia is found in Sections 2220, 2221, 2222, 2223, 2224, 2225 and 2226 of the Georgia Code of 1895. It forms one scheme for the maintenance of public highways at grade over railroads, and for the operation of trains over the same. Section 2222, which is quoted in the Record and in the briefs in this case (and is quoted in our brief further on), requires as to all trains going over the public highway, grade crossings of the State, first: that the whistle of the locomotive be blown from a post located four hundred yards from such highway crossing until the crossing is reached; and second; that the engineer, beginning at the blow-post four hundred yards away from the crossing, must begin to check his train and keep checking. it so as to stop in time should any person or thing be upon the crossing. He is not required to bring his train to a stop.

There is no complaint of the requirement that the whistle be blown.

How does the checking requirement interfere with interstate commerce? The engineer is not required to bring his train to a stop, nor does this law fix any number of miles per hour as the speed at which he shall run between the blow-post and the crossing. If the crossing is approached from a point where there is a full view on both sides of the road, then little or no checking is required of the engineer. The stopping is required only in the event that some person or thing should be upon the crossing. If the crossing is approached from a sharp curve or other point where the engineer would have no chance to protect persons or things upon the crossing until almost upon it, then necessarily much more checking would be required. It is entirely consistent with this statute that trains could run at full speed over these crossings in the great majority of instances, where the engineer could see that the way was clear.

REASONS GIVEN WHY STATE CAN REGULATE SPEED ON CROSSINGS. COMPARISONS WITH SIMILAR LAWS.

If this law worked a serious hardship upon the railroad companies, they could easily construct underground or overhead crossings in most instances, and thus reduce these grade crossings to a minimum.

Grade crossings are recognized everywhere as dangerous, and some States have abolished them altogether. See the statute of Pennsylvania, quoted in Pennsylvania R. R. vs. Braddock, 152 Penn. State, 116, and cited in brief of plaintiff in error.

If the State can abolish grade crossings altogether, can it not impose upon railroads using such dangerous places any reasonable condition before allowing their use? Does not the power to altogether prohibit include the power to regulate? Could not the State require that at every grade crossing there should be a gate and a flagman? Is the law in this case any more unreasonable than the requirement of a gate and flagman?

What difference is there in principle between a railroad track and a public highway used by pedestrians and vehicles, and a grade crossing of two railroads? The law is almost universal that every railroad must bring its trains to a complete stop before running over another railroad track crossed at grade. Surely no attack could be made upon the provisions of such a law applying to two railroads crossing at grade.

And yet there is as much danger of collisions between railroad trains and pedestrians and vehicles at highway crossings, as at crossings of two railroads.

MORE SUGGESTIONS SHOWING REASONABLENESS OF THIS LAW, AND A SUMMING UP OF THE AUTHORITIES.

This case deals only with the civil liability of the railroad for an injury on a crossing. Could not the State, as a condition of allowing railroads to run over such highway crossings, impose an absolute liability in every case for injury?

If the State can require locomotive engineers to be examined and licensed before running interstate trains, as in Smith vs. Alabama, 124 U. S., 465; if the State can require interstate trains to lie absolutely idle one day out of seven, as in Hennington vs. Georgia, 163 U. S., 299; if a municipality can regulate the speed of an interstate train to six miles per hour, as in Erb vs. Morasch, 177 U. S., 584; if the State can regulate the speed of railroad trains in the neighborhood of cities and towns, and can regulate the manner of their approach to bridges, tunnels, deep cuts and sharp curves, as in Crutcher vs. Kentucky, 141 U. S., 47,—can the State not, in the conservative exercise of its police power, protect life on the highway by requiring a reasonable amount of checking and signalling?

PUBLIC SAFETY ON GRADE CROSSINGS DEMANDS AS MUCH DILIGENCE FROM INTERSTATE AS FROM INTRA-STATE TRAINS.

An interstate train is as dangerous to life and property in running over a grade crossing as any other train. The reasons which call for this statute of Georgia apply equally as much to one class of trains as to the other.

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GEORGIA CASES EXPLAINED AS TO EFFECT OF BLOW-POST LAW.

Judge Burns, in his dissenting opinion in the Circuit Court of Appeals, upon the decision of this case, quoted a remark made by Chief Justice Simmons, of Georgia, in the case of Central of Georgia Ry. Co. vs. Hall, 109 Georgia, 367, to the effect that trains could not observe literally the blow-post law and make their schedules.

Judge Simmons stands alone among the judges of Georgia in his opinion about the hardship of the blow-post law. The blow-post law has been before that tribunal in scores of cases and no other judge, so far as we can ascertain, has ever questioned its wisdom or commented upon its hardship.

In the recent case of Grizzle vs. Southern Railway Company, 131 Georgia, 287, which was the very last decision upon this subject rendered, and decided in 1908, the Supreme Court of Georgia sustained the constitutionality of this law against the attack which is now being made upon it, and held that it was no interference with interstate commerce.

In Brunswick and Western R. R. vs. Hoover, 74 Georgia, 428, Chief Justice Jackson, in alluding to this law and explaining its provisions, said:

"Not only, therefore, is it negligence, but negligence of the grossest and gravest character, not to comply with these statutory enactments to preserve human life on the public highway, when that highway crosses the railroad track; so grave that it is made criminal not to comply with these enactments."

The blow-post law was again enforced in the case of Williams vs. Southern Railway Co., 126 Georgia, 710; Central of Georgia Ry Co. vs. North, 129 Georgia, 106; and Western and Atlantic Railroad vs. York, 128 Georgia, 687.

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These decisions show that the Supreme Court of Georgia has not given the remarks of Judge Simmons the effect claimed for them by counsel for plaintiff in error.

In conclusion, we say that a close inspection of the Act shows that it does not require a train to stop at a crossing, but only to check. It only requires checking so as to be able to stop in time should any person or thing be on the crossing. In the great majority of instances, the blowing of the whistle will keep the public crossing clear of persons, and no checking whatever will usually be required. In other words, this law makes the checking, and its extent, depend upon the circumstances of danger attending the case.

ARGUMENT FOR DEFENDANT IN ERROR.

Constitutional Questions Not Properly Made.

It is doubtful whether the plaintiff in error has made its questions in such a way that this court can consider them.

The question which the defendant is attempting to have decided is whether the Georgia statute contained in Section 2222 of the Georgia Code of 1895 is void as imposing an unauthorized State burden on interstate commerce.

This law is applicable to railroad companies and reads as follows:

"There must be fixed on the line of said roads, and at the distance of four hundred yards from the center of each of such road crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road."

The road crossings which are referred to in this statute mean public, grade crossings on all the public roads of the State.

The road in the case at bar was of that description; and not only so, but the railroad company in this case has recognized the blow-post law and acquiesced in it by erecting blow-posts, as this law requires, on each side of the crossing in question.

The defendant, by a plea which appears in the record, undertakes to set up in general, in vague terms, some supposed interference of the blow-post law with interstate commerce. The material portions of the amended answer setting up this contention are as follows:

(After first setting up that the train which caused the injury was engaged in interstate commerce.) "Defendant further shows that the statute of Georgia, which is in these words, to-wit: (Here citing the blow-post law which we have heretofore quoted), the violation of which plaintiff alleges as the negligence in this case, is and was inoperative as to defendant's train, which plaintiff alleges injured her, for the reason that it is in violation of Section 8, Article First, of the Constitution of the United States, which gives to Congress the right to 'regulate commerce with foreign nations, and among the several States

and with the Indian tribes.' Your defendant further shows that the statute of Georgia is not a reasonable regulation of the police power of the State to secure the safety of persons, but that the statute is a direct burden on and impedes the interstate traffic being done by this defendant, and impairs the usefulness of its facilities for such traffic. Defendant further shows that it is impossible to observe said statute and carry the mails as defendant is required to carry them under the contract it has with the government; and it is likewise impossible to do an interstate business, and at the same time comply with the terms of said statute.

"Wherefore, it says that said statute is inoperative as to it, and it should not be required to comply with the same on its interstate line of railroad."

This attack upon the constitutionality of the blow-post law is vague and indefinite in the following particulars:

It fails to set out how a compliance with this law interferes with interstate commerce.

It fails to allege how many public crossings there are in the path of this train between the South Carolina line and Atlanta.

It is entirely consistent with this pleading that the public crossing in question was the only public crossing in the territory named.

It fails to set forth just how long a train will be delayed by undertaking to check up for each of these crossings; it gives no data whatsoever which will enable the Court to determine whether the delay caused to a train by a compliance with this law is serious or trifling.

The Court is not bound by a conclusion of a pleader that the statute is a burden on interstate commerce. The rule in pleading here is analogous to the pleading in cases of fraud. A general charge of fraud in a pleading always counts for nothing; the particulars constituting the fraud must be set forth.

It will be borne in mind that the plaintiff in error here is claiming that a certain state of facts makes compliance with this blow-post law a burden on commerce. Should not the state of facts be so clearly and explicitly pleaded as to enable the Court to determine for itself whether an unreasonable burden is imposed on interstate commerce?

In Parham & Co. vs. Potts-Thompson Liquor Co., 127 Georgia, 303, the rule is thus stated:

"An averment in a pleading, that a named statute is 'unconstitu-

tional and void," is too vague and indefinite to raise any question for determination." See also a similar ruling in Newkirk vs. Southern Railway Company, 120 Georgia, 1048.

It would not seem to cure the objection that the particular clause of the Federal Constitution which is claimed to be violated is specified; it should be shown how and wherein the State law operates to violate this clause of the Federal Constitution, especially if the violation depends upon a certain condition or state of facts, as is claimed in this case.

After this plea was stricken, plaintiff in error offered in evidence the testimony of the witness Dewberry, and counsel for plaintiff in error, upon objection being made to Dewberry's evidence, proposed to prove by Dewberry the following facts:

"I expect to prove that between the South Carolina line and Atlanta, there are practically one hundred road crossings, or between eighty-five and one hundred public road crossings; that the distance is one hundred and one miles; that the crossings in some localities are very close together, and within a few hundred yards of each other, and at others further apart, but on the average making a crossing to the mile almost. We expect to show further, that to observe the statute and check and keep checking so as to have a train under control, and to stop should any person or thing be on the crossing, it would consume from five to ten minutes for each crossing, dependent, of course, upon the weight and length of the train, and the grade; but it would make an average of seven or eight minutes. We wish to show that this train was made up and known as No. 39, the vestibule train which runs from the City of Washington, though the States of Virginia, North Carolina, South Carolina and Georgia; that it was carrying passengers from one State to another, also carrying an express car with freight on it, from one State to another. We wish and expect to show that obedience to that Crossing Act would hinder, and practically prevent interstate business being done by the defendant railroad. We wish to show the condition I have just stated all existed at the time this accident occurred, on the 11th of Ocober, 1903."

Outside of the fact that there was no pleading to justify this proposed proof, we say that it was too uncertain and indefinite to be the basis of a legal exception. The counsel said he proposed to prove that there were between eighty-five and one hundred public crossings in this territory. He should have been exact in his offer. He said that he expected to show on the average of a crossing to the mile,

"almost." He should have been more exact in this. He said that he expected to show that to check and have the train under control for every crossing would consume from five to ten minutes for each crossing, dependent upon the weight and length of the train, and the grade. He should have been more exact in this.

The Circuit Court of Appeals, in the decision rendered in this case, declined to consider this offer of proof as a ground for exception, and uses the following language:

"The objection was sustained, testimony excluded and exception noted. We are of the opinion that there was no error in the action of the Court in sustaining the objection, as the testimony was not properly admissible in the absence of pleading to support it. This view seems to have obtained with counsel for defendant below, as evidenced by the amendment filed and heretofore discussed."

In Georgia, written pleadings are required. By Section 4960 of the Georgia Code of 1895, it is provided:

"All suits in the Superior Courts for legal or equitable relief, or both, shall be by petition to the Court, signed by the plaintiff or his counsel, plainly, fully, and distinctly setting forth his charge, ground of complaint and demand, and the names of the persons against whom process is prayed."

By Section 5049 of the same Code, it is provided:

"The defendant may, by proper pleadings, raise issues of law, or of fact, legal or equitable, or both. All issues of law shall be raised by demurrer. All issues of fact shall be raised by plea or answer, which may be of a dilatory nature, or to the merits."

Thus it will be seen that inasmuch as written pleadings are required, the defendant had no basis for any evidence upon this alleged constitutional objection, after its plea had been stricken.

But in case the Court should hold that the questions sought to be raised by the plaintiff in error are properly made, either in the amended answer or in the proposed evidence, we will discuss the question now upon its merits.

ARGUMENT ON MERITS.

Incidental Or Remote Effect On Interstate Commerce Does Not Vitiate State Legislation.

The Constitution of the United States gives Congress the right "to regulate commerce with foreign nations and among the several States, and with the Indian tribes." (Section 8, Article 1, Constitution of the United States.)

In Sherlock vs. Alling, 93 U. S., p. 99, the Court say:

"In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislation upon all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution."

In the case of Chicago, etc. R. R. vs. Solan, 169 U. S., p. 133, the Court say:

"The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits. Such are the grounds upon which it has been held to be within the power of the State to require the engineers and other persons engaged in the driving and management of all railroad trains passing through the State to submit to an examination by a local board as to their fitness for their position; or to prescribe the mode of heating passenger cars in such trains."

SOME PREVIOUS DECISIONS NOT IN POINT.

Decisions on State Legislation Which Directly Sought to Control Commerce, Not In Point Here. Legislation In Case at Bar, Is An Aid To Interstate Commerce.

It will be seen from the two decisions just quoted, first, that the police power of the State may be exercised, even though it may incidentally and to some extent affect interstate commerce; second, that so long as Congress has not legislated upon a particular subject, State legislation of a reasonable kind is in order and not unconstitutional; and, third, that the rightful exercise of police power by the State, even though it may incidentally affect commerce, is to be regarded as legislation in aid of such commerce.

Many cases have been decided by the Supreme Court of the United States which more than cover this case. It has been held that legislation by a State, which directly undertakes to regulate commerce, is void; while other legislation, which incidentally affects it equally as much as a direct regulation of it, has been held valid. In Atlantic, etc. R. R. vs. Wharton, 207 U. S., p. 334 the Court say:

"It hence arises that any command of a State, whether made directly or through the instrumentality of a railroad commission, which orders, or the necessary effect of which is to order, the stopping of an interstate train at a named station or stations, if it directly regulates interstate commerce, is void.

"It has been decided, however, that some orders which may cause the stoppage of interstate trains made by State authority may be valid if they do not directly regulate such commerce."

Counsel for the plaintiff in error in his brief relies almost wholly on the line of decisions of which the Wharton case, just quoted, is a specimen. In the Wharton case, the railroad commission of South Carolina required the railroad company to stop on signal two of its through fast mail interstate trains at a small station in South Carolina, which had quite a number of local trains each day, and this rule of

the commission was held to be an unreasonable burden upon interstate commerce.

The same ruling was made in the case of Mississippi Railroad Commission vs. Illinois Central R. R. Co., 203 U. S., p. 335. In the Mississippi case, the facts were practically identical with the South Carolina case.

The case of Cleveland, etc. R. R. vs. Illinois, 177 U. S., p. 514, cited by plaintiff in error, held to be invalid a statute which required all through interstate commerce trains to stop at every county seat when adequate train service had already been provided for local traffic.

The same is true of the State of Illinois vs. Illinois, etc. R. R. Co., 163 U. S., p. 141. The line of decision just quoted, holding that an attempt to make through interstate trains stop at a designated station is an unreasonable burden upon interstate commerce, is easily distinguishable from the case at bar. In the cases cited the remedy of the State was to require the railroad to give adequate train service with its other trains to the various stations at which it was sought to make the through trains stop. If the service was inadequate, it was not the proper remedy to cause the stoppage of the through trains, but to improve the service of the other trains. As the Court said in the Wharton case (cited above):

"Fault is found here with the character of some of the local trains in that the appointments thereof were not up to a sufficiently high standard. These deficiences are remediable by other means than the stoppage of the two trains in question."

To attempt to stop all through trains at county seats or other points is sheer tyranny, if those stations have already adequate service. After adequate train service is given, it can neither aid the public health, safety, morals or convenience, to require other trains to stop, and it has been justly held that such laws are mere attempts to fix arbitrary and unreasonable schedules for railroad companies. In effect, all that such laws can accomplish is to regulate interstate commerce. Such laws bear no relation to the public safety, health or morals. They are purely and simply regulations of commerce.

CASES WHICH CONTROL THE CASE AT BAR.

The case at bar belongs to an entirely different class.

In Smith vs. Alabama, 124 U. S., p. 465, the statute of Alabama requiring locomotive engineers to be examined and licensed, was held not to be a regulation of interstate commerce even as applied to railroads having interstate lines, and the ruling of the court is thus summed up in the third head-note:

"Such statute, so far as it affects transactions of commerce among the States, does so indirectly, incidentally and remotely, and not so as to burden or impede them; and in the particulars in which it touches those transactions at all, it is not in conflict with any enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence."

We may remark in this connection that Congress has not enacted any legislation which regulates the operation of interstate trains over grade crossings. It is manifestly one of those subjects in which the State is left free to enact its own laws.

In the case of Crutcher vs. Kentucky, 141 U. S., 47, the Court uses the following language, which not only in its reasoning, but in its illustrations, squarely covers the case at bar:

"But whilst it is only such things as are clearly injurious to the lives and health of the people that are placed beyond the commercial power of Congress, yet when that power or some other exclusive power of the Federal Government is not in question, the police power of the State extends to almost everything within its borders; to the suppression of nuisances; to the prohibition of manufactures deemed injurious to the public health; to prohibition of intoxicating drinks, their manufacture or sale; to the prohibition of lotteries, gambling, horse-racing or anything else that the legislature may deem opposed to the public welfare (citing authorities). It is also within the undoubted province of the State Legislature to make regulations with regard to the speed of railroad trains in the neighborhood of *cities and towns;* with regard to the precautions to be taken in regard to the approach of such trains to *bridges, tunnels, deep cuts and sharp curves,* and, generally, in regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce. Such regulations are eminently local in their character, and in the absence of congressional

regulations over the same subject, are free from all constitutional objections, and unquestionably valid."

If, as the Court says in the Crutcher case, the Legislature can regulate the speed of trains in the neighborhood of cities and towns, and can require the precautions to be taken in approaching bridges, tunnels, deep cuts and sharp curves, can it not equally regulate its speed and manner of approaching dangerous grade crossings?

In Lake Shore R. R. vs. Ohio, 173 U. S., p. 286, a statute of Ohio which required every railroad company operating within the State to cause three of its regular passenger trains each way daily to stop at every village containing over three thousand inhabitants long enough to receive and let off passengers, was held to be a valid law, and not an improper regulation of interstate commerce.

In Gladson vs. Minnesota, 166 U. S., pp. 427 and 430, a law of Minnesota requiring all trains running between points within the State to stop at county seats, was upheld, and the Court, in the body of the opinion, use this language, which is controlling in the case at bar:

"The principles of law which govern this case are familiar, and have often been affirmed by this Court. A railroad corporation created by a State is for all purposes of local government a domestic corporation, and its railroad within the State is a matter of domestic concern. Even when its road 'connects, as most railroads do, with railroads in other States, the State which created the corporation may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. It may prescribe the location and the plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience and comfort of the passengers and of the public. All such regulations are strictly within the police power of the State. They are not in themselves regulations of interstate commerce; and it is only when they operate as such in the circumstances of their application, and conflict with the express or presumed will of Congress exerted upon the same subject, that they can be required to give way to the paramount authority of the Constitution of the United States."

In the case of Hennington vs. Georgia, 163 U. S., p. 300, the question involved the validity of Georgia's statute, making it unlawful to run any freight train on Sunday. The effect of this statute was

absolutely to shut off all interstate trains for a period of twenty-four hours. The delay and stoppage caused by such a law was infinitely greater than the slight and incidental slowing up and checking for grade crossings; and yet this law was sustained in the Hennington case as a valid exercise of the police power of the State of Georgia, and it was held that the incidental effect upon commerce did not render the law void.

A case which covers this case absolutely is that of Erb vs. Morasch, 177 U. S., p. 584, in which the question involved was a municipal ordinance of Kansas City, Kansas, which restricted the speed of all trains within its limits to six miles per hour, whether the same were interstate or intrastate trains. The objection made is the identical one made in the case at bar, to-wit: that to cause the speed to slow down interfered with the rapid transit of interstate trains, and thus interfered with the carriage of the mails and of interstate commerce. The Supreme Court of the United States, ruled that "a regulation by a city of the speed of railroad trains within the city limits is not, as to interstate trains, an unconstitutional regulation of interstate commerce,—at least until Congress takes action in the matter."

There is not a particle of difference in principle between the case at bar and Erb vs. Morasch. To require the train to slow up for a grade crossing no more interferes with interstate commerce than to bring it down to a speed of six miles per hour in every municipality through which it might pass. If one city could pass such an ordinance, all cities could pass it. There are doubtless nearly as many villages, towns and cities in the various States as grade crossings. The principle which lies at the bottom of the decisions sustaining these laws is that they are intended to promote the public safety, and are not primarily regulations of interstate commerce, and only affect it incidentally and remotely. In other words, as the Court said in the Solan case, such regulations of the State are in aid of commerce. They make commerce safe and more advantageous to the public. The commerce which the United States wants to promote is not the commerce

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which takes human life or scatters pestilence, but the commerce which is conducted reasonably, and which promotes the public safety, health and welfare. Therefore, such regulations, which save life, health and morals, aid commerce.

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PRACTICAL OPERATION OF GEORGIA STATUTE.

To come now to the exact way in which the blow-post law of Georgia operates: What is known as the blow-post law of Georgia is found in Sections 2220, 2221, 2222, 2223, 2224, 2225 and 2226 of the Georgia Code of 1895. It forms one scheme for the maintenance of public highways at grade over railroads, and of the operation of trains over the same. Section 2220 requires "all railroad companies shall keep in good order at their expense public roads or private ways established pursuant to law where crossed by their several roads, and build suitable bridges and make proper excavations or embankments according to the spirit of the road laws."

Section 2221 requires that such crossings include the width of land on both sides of the road allowed by charter or appropriated by the company therefor, and for as many feet beyond, each way, as is necessary for a traveler to get on or off the cars safely and conveniently.

Section 2222 is the law in question, and we have already quoted it.

This Act was passed in 1852, long before any railroad now operating in Georgia acquired any franchise therein. The Georgia Railroad and Banking Company, and the Central Railroad and Banking Company, were then in existence, but neither are now operating under their franchises, and lessees are in posession.

Therefore, every railroad company in Georgia takes its franchise and its right to operate subject to the provision of this law, which has been sustained and applied by the Supreme Court of Georgia in many cases.

A full history of this statute will be found in Southern Railway vs. Combs, 124 Georgia, p. 1004. The cause for the passage of this law on January 22, 1852, was a shocking accident which occurred on December 14, 1851, at a grade crossing in Monroe county, in which a carriage containing a lady and four children, driven by a negro slave,

was run into by a train of the Macon and Western Railroad Company, and two of the children and the driver killed, and the other occupants seriously injured. The cases growing out of this accident were known as Railroad vs. Davis, 18 Ga., 679; Railroad vs. Wynn, 19 Ga., 440, and Railroad vs. Wynn, 26 Ga., 250.

The requirements of the Act, so far as the case at bar is concerned, are (first) that the whistle of the locomotive be blown continuously from a post located four hundred yards from the crossing until the crossing is reached, and by Section 2224, if the crossing is in an incorporated town, a continuous ringing of the bell for the same distance is substituted for the blowing of the whistle. (Second) Beginning at the blow-post four hundred yards away, the engineer must begin to check his train and keep checking so as to stop in time should any person or thing be upon the crossing. He is not required to bring his train to a stop.

Surely the requirement that the whistle be blown or the bell rung cannot interfere with interstate commerce.

How does the checking requirement interfere with interstate commerce?

The engineer is not required to bring his train to a stop, nor does the law fix any number of miles per hour as the speed at which he shall run between the blow-post and the crossing. If the crossing is approached from a point where there is a full view on both sides of the road, then little or no checking is required of the engineer. The stopping is only required in the event any person or thing should be upon the crossing. If the crossing is approached from a sharp curve where the engineer would have no chance to protect the person or vehicle upon the crossing, until almost upon it, then necessarily much more checking would be required.

It is entirely consistent with the terms of this statute, that trains can run at full speed over crossings in the great majority of instances.

REASONS GIVEN WHY STATE CAN REGULATE SPEED ON CROSSINGS. COMPARISONS WITH SIMILAR LAWS.

Is it not within the power of the State to require certain measures of diligence on the part of those operating trains when passing over dangerous places like grade crossings?

If this law worked such a hardship upon the railroads, they could easily construct underground or overhead crossings whenever practicable, and thus reduce these grade crossings to a minimum. Really, this would be best for the railroads and for the public.

To maintain these grade crossings is a most dangerous undertaking, and is so recognized everywhere, and some States have abolished grade crossings altogether. See the statute of Pennsylvania, quoted in Pennsylvania R. R., vs. Braddock, etc. R. R., 152 Penn. State, 116, and see the statute of Connecticut, quoted in the case of the town of Westbrook, 57 Conn., p. 95, both of which are cited on page 45 of brief of plaintiff in error.

If the State can abolish grade crossings altogether, can it not impose upon the railroads using such dangerous places almost any conceivable condition before allowing their use? The power to altogether prohibit certainly includes the power to regulate.

The time doubtless will come when if grade crossings are to be maintained at all, there will be gates and flagmen stationed at every crossing. Could it be doubted that a law requiring a gate or flagman would be a valid exercise of the State's police power?

Again, what is the difference in principle between a grade crossing over a railroad track upon which pedestrians and vehicles pass, and a grade crossing of two railroads? The law is almost universal that every railroad must bring its trains to a complete stop before running over another railroad track crossing at grade. Practically every State has a law requiring each company to come to a complete stop under such circumstances.

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See Georgia Code of 1895, Section 2234 which provides as follows:

"Whenever the tracks of separate and independent railroads cross each other in this State, all engine drivers and conductors must cause the trains which they respectively drive and conduct to come to a full stop within fifty feet of the place of crossing, and then to move forward slowly. The train of the road first constructed and put in operation shall have the privilege of crossing first."

Would anybody attack the provisions of this law as an interference with interstate commerce? And yet it is easy to conceive of a situation where there might be such a number of these grade crossings as to interfere with the speed of trains. Such a provision is in the interest of public safety, and commerce would not be hurt, but would benefit by it.

There is no more danger of collision at a point where two railroads cross each other than where a dirt road crosses a railroad. In one case the danger is that of colliding with another train. In the other case it is that of colliding with pedestrians or vehicles of various kinds.

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MORE REASONS, AND A SUMMING UP OF THE ARGUMENT.

Inasmuch as we are dealing only with the civil side of this blow-post law, would it not be competent for the State to enact that in every case where a railroad crosses a highway at grade, that the railroad shall pay all damages done to persons or property upon that crossing? The law which is the subject-matter of attack here does not itself prohibit the running of trains over these crossings in violation of law. So far as the case at bar is concerned, it merely fixes a civil liability. Laws have been sustained which absolutely make railroads liable under certain circumstances irrespective of negligence. The common law liability of the carrier of freight makes him an insurer. Nothing excuses him except the act of God or the public enemy.

It being within the power of the State to abolish grade crossings altogether, surely the State, as a condition of allowing the railroads to maintain them, can require them to submit to reasonable regulations, and one of these conditions could be the creation of a liability for injuries occurring upon such crossing.

To sum up the question: If the State can regulate the operation of interstate railroads by requiring locomotive engineers to be examined and licensed before they run, as in the Smith case from Alabama, 124 U. S., p. 465; if the State can require interstate trains to lie absolutely idle one day out of seven, as in Mennington vs. Georgia, 163 U. S., p. 299; if a municipality can regulate the speed of an interstate train to six miles per hour, as in Erb vs. Morasch, 177 U. S., p. 584; if, in the language of the Court, in Crutcher vs. Kentucky, 141 U. S., p. 47, States can pass laws

"With regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in regard to the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and generally, with regard to all operations in which the

lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce;" and if, as stated by the Court in Gladson vs. Minnesota, 166 U. S., p. 430, the State may "prescribe the location and the plan of construction of the road, the rate of speed at which the trains shall run," and if, as is admitted in the brief of counsel for plaintiff in error, the State can prohibit grade crossings altogether; if the law can require trains of railroads which cross each other at grade to come to an absolute stop,—can the State not, in the conservative exercise of its police power, protect life and property upon highway crossings at grade, by simply requiring a reasonable degree of checking and signalling?

Is it not manifest that the primary object of this law being the public safety, that if there is any effect upon interstate commerce, it is only incidental and remote? Is it not manifest that the law is designed to protect lift and property, and is not intended directly to regulate commerce in any shape, manner or form?

PUBLIC SAFETY ON GRADE CROSSINGS DEMANDS AS MUCH DILIGENCE FROM INTERSTATE AS FROM INTRASTATE TRAINS.

An interstate train or a through mail train is as dangerous in going over a public crossing as any other train. Surely, there is nothing unreasonable in the Georgia law which makes the blow-post law apply to all trains. Any train will produce death or injury in causing a collision at a grade crossing. It was for this reason that in the Erb case, hereinbefore cited, the ordinance of the Kansas town, with regard to the speed of interstate as well as intrastate trains, was upheld. If the State law is to apply to any trains at grade crossings, it must necessarily apply to all. All trains which go at high speed are dangerous. How absurd it would be to enact a law which would say that local freight or passenger trains shall observe certain requirements of care at public crossings and thus save life, and at the same time, put no requirement upon interstate or mail trains in the way of speed or signals.

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GEORGIA CASES EXPLAINED AS TO EFFECT OF BLOW-POST LAW.

In the trial of this case in the Circuit Court of Appeals, two of the circuit judges, Judges Pardee and Shelby, presided, and District Judge Burns, of Texas, made the third judge. The two circuit judges concurred in the opinion that the statute of Georgia was a valid exercise of the police power, from which District Judge Burns dissented.

Judge Burns based his dissent mainly upon a remark of Chief Justice Simmons, of Georgia, in the case of Central of Georgia Railway vs. Hall, reported in 109 Georgia, p. 367, in which case Judge Simmons used language to the effect that trains could not observe literally this blow-post law and make their schedules.

Judge Simmons is absolutely alone in his opinion about the hardship of this law among the various judges who have served upon the Supreme Court of Georgia. The blow-post law has been before that tribunal in scores of cases, and no other judge, so far as we can ascertain, has ever questioned its wisdom or commented upon its hardship.

In the recent case of Southern Railway vs. Grizzle, 131 Georgia, p. 287 (and which is the very last decision upon the subject) the Supreme Court of Georgia sustained the constitutionality of this law against the very same attack now being made upon it, and held that it was no interference with interstate commerce. Surely, this ruling in a case in which the identical question now before the Court was involved, should have more weight than the mere remark of Judge Simmons in the Hall case, especially as Judge Simmons wound up in the Hall case with the following:

"Still, it (the blow-post law) is the law of the land, and the Courts must enforce it, however hardly it may work upon the business interests of the country if it should be observed, or upon the railroads when they violate it."

Other judges of the Supreme Court have concurred in the enforcement of this law, and thought that it was a wise one. Chief Justice Jackson, in the case of Brunswick & Western R. R. vs. Hoover, 74 Georgia, p. 428, in alluding to this law and explaining its provisions, said:

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"Not only, therefore, is it negligence, but negligence of the grossest and gravest character, not to comply with these statutory enactments to preserve human life on the public highway, when that highway crosses the railroad track; so grave that it is made criminal not to comply with these enactments."

The blow-post law was again enforced in the case of Williams vs. Southern Railway Company, 126 Georgia, p. 710; and again in the case of Central of Georgia Railway Company vs. North, 129 Georgia, p. 106, and again in Western and Atlantic Railroad vs. York, 128 Georgia, p. 687.

We will not cite further cases in which this law has been enforced. We submit that the remarks of Judge Simmons, in the Hall case, that it was impossible for the railroads to transact the business of the country and obey this law, are not warranted by a consideration of the Act itself. The Act does not require a train to stop at a crossing, but only to check. It only requires checking so as to be able to stop in time "should any person or thing be upon the crossing." Surely, common humanity would require that the train should be checked or stopped if any person or thing is upon the crossing, or in danger.

In the great majority of instances, the blowing of the whistle four hundred yards away will serve to keep persons at a safe distance from the crossing. In the great majority of instances, there are no persons on or near the crossing, and very little, if any, checking is required. In many instances, the view on either side of the railroad is not obstructed, and the engineer can readily see that it will be impossible for anything to get upon the crossing before his train passes. He is only required to have his train in a condition of checking when somebody is on or near the crossing, in a condition of danger, and should not the law protect human life under such circumstances?

Respectfully submitted,

Reuben R. Arnold

Attorney for Defendant in Error.

(21,140.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 141.

SOUTHERN RAILWAY COMPANY, PETITIONER,

vs.

INEZ KING, BY HER NEXT FRIEND, MRS. JOSEPHINE KING.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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United States Circuit Court of Appeals, Fifth Circuit.

No. 1635.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
versus
INEZ KING, by Next Friend, MRS. JOSEPHINE KING, Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Georgia.

[Original record filed January 11, 1907.]
U. S. Circuit Court of Appeals. Filed Feb. 19, 1907.
CHARLES H. LEDNUM.

1 STATE OF GEORGIA,
Habersham County:

To the Superior Court of said County:

Inez King, by her next friend, Josephine King, brings this suit against the Southern Railway Company, and alleges:

1.

That said Southern Railway Company is a railroad corporation and was on the 11th day of October, 1903, operating a railroad in said county, and having agents and a line of track in said county.

2.

That the defendant has injured and damaged the said Inez King, a minor, in the sum of fifteen thousand dollars, by reason of the following facts:

3.

That on the 11th day of October, 1903, petitioner, the said Josephine King, her minor daughter, and said Inez King, and petitioner's husband, one A. O. King, were all traveling on *on* and over a public road or highway of said county, in a buggy drawn by one mule, where they had a right to be, and where in the prosecution of the journey they were obliged to go, and came to the point where said public road or highway, over which they were traveling is crossed by said Southern Railroad, at what is known as the Mag Wade crossing, in said county, and while they, petitioner, her said minor daughter and her said husband were thus traveling upon and over said public road or highway, and upon and over said railroad

crossing, they, and the buggy in which they were riding, and while in the act of crossing said railroad, at said railroad crossing, were run upon and over by defendant's south-bound train, known as local vestibule or train No. 39, at about 2 o'clock P. M., on said 11th day of October, 1903, and the said Inez was then and there seriously and permanently injured and damaged.

2

4.

That at the time of said injury, the said Inez, your petitioner and her said husband were in the exercise of all ordinary care and diligence in going upon and [over] said public railroad crossing; that neither the [said] Inez, your petitioner, nor her husband could have avoided the consequences of said negligence on the part of the defendant themselves, at said time and place, but that the injury and damage to the said Inez was caused solely by the negligence of defendant, its agents and employees, in the running of its locomotive and cars, at a dangerous and rapid speed, over and upon said railroad crossing.

5.

Petitioner shows that, at the place where the said Inez, your petitioner and her said husband approached defendant's track, there were trees, bushes and a high embankment, extending for some distance up and down the railroad track and betweeen said public road and defendant's track, which entirely and completely obstructed the view of the railroad track and the approaching train; that the said Inez, your petitioner and her said husband could not and did not see defendant's track and the approaching train for a distance of seventy-five yards on said public road before reaching the right-of-way of defendant's railroad, by reason of said bushes, trees and embankment; that the said Inez, petitioner and her said husband could not and did not hear the noise from the approaching train, by reason of said bushes, trees and embankment; that they did not hear the whistle of the locomotive until they were upon the track of defendant; that when actually upon the track, the first intimation they had of an approaching train, they heard one quick, short blow of the whistle and were instantly knocked off and from defendant's track by said locomotive and cars.

6.

That defendant, its agents and employees were negligent in running over petitioner's said daughter and in injuring and damaging her in divers particulars, to-wit: That at the time of said injury said train was running at the rate of sixty miles an hour; that the defendant, its agents and employees, in charge of said train,

3 failed to blow the whistle of the locomotive at the blow post; that the defendant, its agents and employees in charge of said train failed to blow the whistle of the locomotive until it arrived at the public road. That the defendant, its agents and employees in charge of said train failed to simultaneously check and keep check-

ing the speed of said train as it approached said crossing, so as to stop in time should any person or thing be crossing said track on said public road over which petitioner, her said daughter and her said husband were then and there passing; that defendant was negligent in maintaining said embankment, trees and bushes at and near said public road crossing, and in failing to have said trees, bushes and embankment removed, which completely obstructed the view of defendant's track and all approaching trains to the public traveling over said public road.

7.

Petitioner shows that the said Inez was struck by said locomotive and thrown some twenty feet into the air and fell upon piles of stone in the public road, striking her back with great force; that her back was seriously and permanently injured; that her arms, shoulders and entire body were bruised and wounded.

8.

Petitioner shows that as the immediate result of said injury to her said daughter, she has been confined to her bed continuously since the 11th day of October, 1903, and is now unable to stand; cannot walk, and can only sit up in an invalid's chair for a few moments at a time, attended with the greatest pain and suffering; that she is ruined for life and rendered incapable of performing any kind of labor; cannot wait upon herself and requires constant care and attention.

9.

Petitioner shows that her said daughter, at the time of said injury, was about fourteen years old, strong and in perfect health; that she had not been sick a day in her life; that she was remarkable bright, very industrious, and capable of earning at the time the sum of two hundred dollars a year with good prospects of her earning capacity being largely increased as she grew older.

4

10.

By reason of said injury to the said Inez, her capacity to labor, earn money and make a support for herself is entirely and completely destroyed, and as a consequence of said injury, the said Inez has suffered, and will always suffer the most intense bodily pain and mental anguish.

11.

She will be compelled to expend large sums of money for medical treatment during her entire life, to-wit: the sum of one thousand dollars or other large sum.

12.

At the time of said injury the said Inez was about fourteen years old, in perfect health and capable of performing any kind of work about the house and farm, and had an expectancy of life of — years.

Wherefore petitioner prays that process may issue requiring said defendant to be and appear at the next term of the Superior Court of said county to answer this complaint.

HOWARD THOMPSON,
Petitioner's Attorney.

Filed in office Sept. 29th, 1904.

J. A. ERWIN, *C. S. C.*

STATE OF GEORGIA,
Habersham County:

To the Sheriff of said County, Greeting:

INEZ KING, by Her Next Friend, JOSEPHINE KING, Complain-t,
vs.
SOUTHERN RAILWAY COMPANY.

The defendant, Southern Railway Company, is hereby required, personally or by attorney, to be and appear at the next Superior Court, to be held in and for said county, on the 1st Monday in March next, then and there to answer plaintiff's demand in an action of complaint.

Witness the Honorable J. J. Kimsey, Judge of said Court, this 1st day of Oct., 1904.

J. A. ERWIN, *Clerk.*

5 GEORGIA,
Habersham County:

I have this day served the defendant, a corporation, by leaving a copy of the within petition and process with F. H. Barker, agent for said corporation, at Ayersville, Ga., this Oct. 6th, 1904.

PAUL F. GRANT, *Sheriff.*

Petition for Removal to the Circuit Court of the United States for the Eastern Division of the Northern District of Georgia.

In the Superior Court of Habersham County, State of Georgia.

INEZ KING, by Her Next Friend, Plaintiff,
vs.
SOUTHERN RAILWAY COMPANY, Defendant.

Your petitioner, the Southern Railway Company, respectfully shows to this Honorable Court:

1. That it is the defendant in the suit, which is of a civil nature, and now pending; that said suit is brought to recover the sum of fifteen thousand dollars for alleged personal injury.

2. Your petitioner further shows that said cause was instituted and begun in the Superior Court of Habersham Co., Ga., by the — Inez King by next friend, the said cause being returnable to March, 1905, term, and that the time required for answering or pleading to the declaration or complaint of the plaintiff under the laws of Georgia and the rules of said Court has not arrived.

3. Your petitioner further shows that this cause being of a civil nature, as aforesaid, is wholly between citizens of different States. Your petitioner, who was at the time of the commencement of this suit, and still is a corporate body, corporated under the laws of Virginia, then and now a resident and citizen of the State of Virginia, and a non-resident of the State of Georgia, and plaintiff, who was and still is a citizen of Georgia, as your petitioner avers.

4. Your petitioner further shows that the controversy between your petitioner and plaintiff is monetary in character, and the sum or value involved and in controversy therein, exclusive of
6 interests and costs, exceeds the sum and value of $2,000, and is the sum of fifteen thousand dollars, as aforesaid.

5. That your petitioner desires to remove this suit before the trial thereof, and to remove same into the next Circuit Court of the United States, to be held in the Eastern Division of the Northern District of Georgia; and your petitioner hereby brings J. W. English, of the County of Fulton, State of Georgia, as its surety, for its entering into the Circuit Court of the United States for the Eastern Division of the Northern District of Georgia, on the first day of its next session or before, a copy of the record in said suit, and for paying all costs that may be awarded by the said Circuit Court of the United States, if said Court should hold that this suit was wrongfully and improperly removed thereto; and, also, for its appearing and entering special bail in said suit, if special bail was originally required therein, and for its complying, in all respects, with the provisions of the laws of the United States in the premises, regulating the removal of causes from the State Courts.

6. And your petitioner therefore prays that the said surety and bond may be accepted; that this suit may be removed into the next Circuit Court of the United States, to be held in the Eastern Division of the Northern District of Georgia, pursuant to the statutes of the United States in such cases made and provided, and that no further proceedings may be had therein in this Court; and your petitioner will ever pray.

7. Your petitioner further shows that its appearance, through its attorneys, to remove this suit, is a special appearance, and does not waive its objection to the jurisdiction of the Court—it being solely for the purpose of removal to said Circuit Court of the United States for the Eastern Division of the Northern District of Georgia.

JNO. J. STRICKLAND,
Petitioner's Attorney.

STATE OF GEORGIA,
Fulton County:

Personally came before me W. N. Foreacre, who, being duly sworn, deposes and says that he is the superintendent of defendant, the Southern Railway Company, petitioner in the foregoing petition for removal; that affiant knows the contents of said petition,
7 having read the same, and said petition is true to his own knowledge, except as to matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Affiant further says that he is authorized to verify the foregoing petition.

W. N. FOREACRE.

Sworn to and subscribed before me this 5th day of November, 1904.

[SEAL.] J. J. AKERS,
Notary Public, Fulton County, Georgia.

Bond.

In the Superior Court of Habersham County, State of Georgia.

Petition to Remove Cause to the United States Circuit Court for the Eastern Division of the Northern District of Georgia from the Superior Court of Habersham Co., Ga.

INEZ KING, by Next Friend,
vs.
SOUTHERN RAILWAY COMPANY.

Know all men by these presents that we, the Southern Railway Company, as principal, and J. W. English, as surety, are held and firmly bound unto Inez King, by next friend, in the penal sum of one thousand dollars, for the payment whereof, well and truly to be made unto the said Inez King, her representatives and assigns, and all others whom it may concern, we bind ourselves, our heirs, our representatives, successors and assigns, jointly and severally, by these presents.

Whereas, The Southern Railway Company has filed its petition in the Superior Court of Habersham Co., asking for the removal to the Circuit Court of the United States for the Eastern Division of the Northern District of Georgia, of a certain cause therein pending, wherein said Inez King, by next friend, is plaintiff, and the Southern Railway Company is defendant:

Now, the conditions of the above obligations are such, that if the said Southern Railway Company shall enter into the said Circuit court of the United States for the Eastern Division of the
8 Northern District of Georgia, aforesaid, on the first day of its next session, or before, a copy of the record in the said suit and shall well and truly pay all costs that may be awarded by said Court, if said Court shall hold that said suit was improperly removed thereto, and shall make special bail if originally required, and shall do and perform all acts required by the laws of the United States to be done by it in the removal of said suit, as aforesaid, then this obligation to be void; otherwise to remain in full force and effect.

In testimony whereof we have hereunto set our hands and affixed our seals, this 3rd day of Nov., 1904.

[SEAL.] SOUTHERN RAILWAY COMPANY,
By JNO. J. STRICKLAND, *Att'y of Record.*
[SEAL.] J. W. ENGLISH, *Surety.*

Executed, acknowledged and subscribed before me this 5th day of November, 1904.

[SEAL.]

W. C. LANIER,
Notary Public, Fulton County, Ga.

Justification of Surety.

STATE OF GEORGIA,
Fulton County:

In person appeared before me W. C. Lanier, a notary public, in and for said county, J. W. English, who, on oath, says that he is a resident of Fulton County and said State; that he is a freeholder therein, and is worth more than one thousand dollars (over and above all exemptions and claims of every kind), subject to the foregoing execution.

J. W. ENGLISH.

Sworn to and subscribed before me this 5th day of November, 1904.

W. C. LANIER,
Notary Public, Fulton Co., Ga.

9 *Entry for Minutes.*

STATE OF GEORGIA,
Habersham County:

INEZ KING, by Next Friend, JOSEPHINE KING, Plaintiff,
vs.
SOUTHERN RAILWAY COMPANY, Defendant.

The defendant, the Southern Railway Company, being the petitioner in the foregoing petition for the removal of the cause aforesaid, having within the time provided by law filed its petition for the removal of this cause to the Circuit Court of the United States for the Eastern Division of the Northern District of Georgia, and having at the same time offered its bond in the sum of one thousand dollars, with J. W. English, good and sufficient surety, pursuant to the statutes and conditions according to law.

Now, therefore, this Court does hereby accept and approve said bond and accept said petition, and does order that the same remain filed with the Clerk of this Court; and it is ordered that this cause be removed for trial to the next Circuit Court of the United States for the Eastern Division of the Northern District of Georgia, pursuant to the statutes of the United States, and that all proceedings of and in this Court be stayed and suspended.

This Mch. 6th, 1905.

By the Court:

J. J. KIMSEY, *J. S. C.*

Clerk's Certificate.

GEORGIA,
Habersham County:

I, J. A. Erwin, Clerk of the Superior Court of said county, do hereby certify that the above and foregoing eight pages contains a complete copy of the record in the case of Inez King, by next friend, Josephine King, vs. Southern Railway Company.

Witness my hand and seal, this March 11th, 1905.

[SEAL.] J. A. ERWIN,
Clerk Superior Court.

Filing: Filed in Clerk's office March 13th, 1905. O. C. Fuller, Clerk.

10 *Answer.*

In the Circuit Court of the United States for the Eastern Division of the Northern District of Georgia, April Term, 1905.

No. —.

INEZ KING, by Next Friend, JOSEPHINE KING,
vs.
SOUTHERN RAILWAY CO.

From Habersham Superior Court.

Now comes the Southern Railway Company, the defendant in the above stated case, on the first day of the first term, and answers the several paragraphs of plaintiff's petition, as follows:

1. This is admitted.
2. Defendant denies this.
3. Defendant denies this as alleged.
4. Defendant denies the allegations in this paragraph.
5. Defendant denies the allegations in this paragraph.
6. This is denied.
7. This is denied.
8. This is denied.
9. This is denied.
10. This is denied.
11. This is denied.
12. Defendant can neither admit nor deny this for the want of information.

Of all of which it puts itself upon the country.

C. R. FALKNER,
JNO. J. STRICKLAND,
Def't's Att'ys.

11 Filing: Filed in office and docketed Apl. 24, 1905. O. C. Fuller, Clerk. By J. C. Moore, Dep'ty.

Consent Order that Cases Nos. 21 & 26 be Tried Together, Etc.

In Circuit Court of U. S., N. D. Georgia.

JOSEPHINE KING
vs.
SOUTHERN RAILWAY COMPANY.

Suit for Damages for Homicide.

In Circuit Court of U. S., N. D. Georgia.

INEZ KING, by Next Friend,
vs.
SOUTHERN RAILWAY COMPANY.

Suit for Damages for Personal Injuries.

It is, by consent, ordered that the two cases above stated be tried together, and that the evidence introduced shall be applicable to each case as if it had been alone for trial, and separate verdicts in each case shall be rendered.

This April 24, 1906.

WM. T. NEWMAN,
U. S. Judge.

Filing: Filed in clerk's office, April 24, 1906. O. C. Fuller, Clerk.

Defendant's amended answer, hereinafter printed at page 28.

* * * * * * *

12 Filing: Filed in Clerk's office and docketed April 24, 1906. W. C. Carter, Deputy Clerk.

Order Sustaining Demurrer.

The demurrer to the within amendment is hereby sustained. This April 27, 1906.

WM. T. NEWMAN,
U. S. Judge.

Filing: Filed in Clerk's office 27 day April, 1906. O. C. Fuller, Clerk.

Instructions.

In the Circuit Court of the United States for the Northern District of Georgia, Eastern Division.

No. 21.

MRS. JOSEPHINE KING, Plaintiff,
vs.
SOUTHERN RAILWAY COMPANY.

No. 26.

Miss INEZ KING, Plaintiff,
vs.
SOUTHERN RAILWAY COMPANY.

Instructions.

Charge of the Court, hereinafter printed at page 129.

* * * * * * *

Verdict.

We, the jury, find for the plaintiff in this case the sum of eight $8000.00 thousand dollars.
This 27th day of April, 1906.

F. G. HADAWAY, *Foreman.*

13 *Judgment.*

Whereupon it is considered, ordered and adjudged by the Court that the plaintiff, Inez King, by her next friend, Josephine King, do recover of the defendant, the Southern Railway Company, the sum of eight thousand dollars, with costs of suit.
This April 27th, 1906.

REUBEN R. ARNOLD,
HOWARD THOMPSON,
Plaintiff's Att'ys.

Judgment signed and filed in open Court April 27th, 1906.
H. H. SIMMONS,
Deputy Clerk.

Motion for New Trial.

Motion for new trial, and order thereon, hereinafter printed at page 135.

* * * * * * *

Plaintiff now comes and voluntarily writes off from said verdict two thousand dollars, leaving said verdict and judgment to stand for six thousand dollars ($6,000.00).
This Oct. 27, 1906.

HOWARD THOMPSON,
REUBEN R. ARNOLD,
Pl'ff's Att'ys.

Filing: Filed in Clerk's office 27th day Oct., 1906. O. C. Fuller, Clerk. By J. C. Moore, Deputy.

Order Overruling Motion, Etc.

The motion for new trial having been argued and submitted to the Court, and the plaintiff having written off from said verdict and remitted the sum of two thousand dollars, leaving said
14 verdict to stand for six thousand dollars, it is ordered that said motion be overruled and the verdict allowed to stand and a new trial denied.

Oct. 27, 1906.

WM. T. NEWMAN,
U. S. Judge.

Filing: Filed in the Clerk's office Oct. 27, 1906. O. C. Fuller, Clerk. By J. C. Moore, Deputy.

Amended Motion.

Mrs. JOSEPHINE KING
vs.
SOUTHERN RY. COMPANY.

INEZ KING, by Next Friend,
vs.
SOUTHERN RY. COMPANY.

Amended motion for new trial, hereinafter printed at page 140.

* * * * * * *

Filing: Filed in office and docketed Oct. 27th 1906. O. C. Fuller, Clerk.

15 *Affidavit of T. G. Hadaway.*

In the U. S. Federal Court for the Eastern Division of the Northern District of Georgia.

Mrs. JOSEPHINE KING
vs.
SOUTHERN RY. COMPANY.

INEZ KING, by Next Friend,
vs.
SOUTHERN RY. COMPANY.

Two Suits for Damage.

Tried Together; Verdicts for Plaintiffs, and Motion for New Trial.

GEORGIA,
Clarke County:

Personally came before the undersigned, an officer of said State

and County, authorized to administer an oath, F. G. Hadaway, who, being duly sworn, says:

I was a member of the jury that tried the two above stated cases, that of Mrs. Josephine King versus the Southern Railway Company and that of Miss Inez King, vs. So. Ry. Co., at the April Term, 1906, of the U. S. Circuit Court for the Eastern Division of the Northern District of Georgia. At the time the Judge was delivering his charge there was a terriffic hail storm in progress and the noise made by the storm was so great that I could not hear all the Judge said with any sort of distinctness, and not sufficient to be able to understand his instructions.

This affidavit is made to be used in the motion for new trial in each of the above stated cases.

T. G. HADAWAY.

Sworn to and subscribed before me, this October 26th, 1906.
JAMES F. FOSTER, *J. P.*

Filing: Filed in clerk's office, Oct. 27, 1906. O. C. Fuller Clerk.

16 *Affidavit of Thos. F. Green.*

In the United States Federal Court for the Eastern Division of the Northern District of Georgia.

Mrs. JOSEPHINE KING
vs.
SOUTHERN RY. COMPANY.

INEZ KING, by Next Friend,
vs.
SOUTHERN RY. COMPANY.

Two Suits for Damages.

Tried Together, Verdict for Plaintiffs, and Motion for New Trial.

GEORGIA,
Clarke County:

Personally came before the undersigned, an officer of said State, authorized to administer an oath, Jno. J. Strickland and Thos F Green, each of whom being duly sworn, said: I was of counsel in the trial of the two above cases at the April Term, 1906, of the U. S. Circuit Court at Athens, Ga. At the time the Judge was delivering the charge, I was as close to him as were a number of the jurors, and made every effort to hear and understands what the Judge said. The raging of the storm outside made so much noise that I found it impossible to hear a great deal he said, and found it impossible to follow his instructions with any sort of certainty; that a juror unfamiliar with the law and the instructions expected, in my opinion, at that time, could not have heard a sufficient amount of what the Judge said to get any connected opinion as to what law the Judge was actually charging.

This affidavit is made to be used in the motion for new trial in each of the above stated cases.

JNO. J. STRICKLAND.
THOS. F. GREEN.

Sworn to and subscribed before me, this October 26, 1906.

T. L. MITCHELL,
[SEAL.] *Notary Public, Clarke Co., Ga.*

Filing: Filed in Clerk's office, October 27, 1906. O. C. Fuller,

17 *Petition for Writ of Error.*

In the Circuit Court of the United States for the Eastern Division of the Northern District of Georgia.

INEZ KING, by Next Friend, JOSEPHINE KING,
vs.
SOUTHERN RAILWAY COMPANY.

The above named defendant, conceiving itself aggrieved by the verdict rendered against it at the April Term, 1906, of said Court, to-wit: on the 27 day of April, 1906, and at the judgment entered up against it upon said verdict; and also by the rulings, decisions and acts in said case of said Court and the Judge presiding therein, which are specifically set forth in its bill of exceptions and its assignment of error herewith filed, alleges that said verdict was unjust and erroneous, and that the judgment entered against it was unjust and erroneous, and that the Court and Judge thereof erred in rendering said judgment and in making the decisions and rulings and in the acts, as in said bill of exceptions and assignment of errors are set out, greatly to the prejudice and injury of defendant, all of which will more fully appear in said assignment of errors and bill of exceptions.

Wherefore defendant comes and prays that a writ of error may issue in its behalf to the United States Circuit Court of Appeals for the Fifth Circuit, for the correction of the errors so complained of, and that a transcript of the records, proceedings and papers in said case, duly authenticated, may be sent to said Circuit Court of Appeals. And also that an order be made fixing the amount of security which defendant shall give upon the said writ of error to the plaintiff, and providing that upon the giving of such security all further proceedings in this Court be suspended and stayed, and that judgment against defendant in favor of plaintiff be suspended and stayed, until the determination of said writ of error by the United States Circuit Court of Appeals for the Fifth Circuit.

This Nov. 17, 1906.

JNO. J. STRICKLAND,
Defendant's Attorney.

[Indorsed:] U. S. Circuit Court. Filed in Clerk's office, Nov. 17, 1906. O. C. Fuller, Clerk.

18 *Order Allowing Writ of Error and Supersedeas.*

In the Circuit Court of the United States for the Eastern Division of the Northern District of Georgia.

INEZ KING, by Next Friend, JOSEPHINE KING,
versus
SOUTHERN RAILWAY COMPANY.

On the — day of November, 1906, comes the defendant in the above stated case, by its attorney, and has filed therein and presented to the Court its petition, praying for the allowance of a writ of error, intended to be urged by it, and defendant also presents herewith *as* assignment of errors alleged to have been committed, and prays that a transcript of the verdict, judgment, record, proceedings and papers upon which the several orders herein rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit, and that such other and further proceedings be had *and* as may be proper in the premises.

On consideration thereof, the Court does allow and grant the writ of error, upon the defendant giving bond and security in the sum of $12000.00, and upon the giving of said bond in said sum, when it is approved by the Court, the judgment herein rendered in favor of plaintiff against the defendant shall be suspended, and supersedeas will be granted until the determination of said writ of error by the United States Circuit Court of Appeals for the Fifth Circuit.

WM. T. NEWMAN,
U. S. Judge.

Filing: U. S. Circuit Court. Filed in Clerk's Office, Nov. 17, 1906. O. C. Fuller, Clerk.

* * * * * * *

19 *Assignment of Error.*

In the United States Circuit Court for the Eastern Division of the Northern District of Georgia.

No. 26.

INEZ KING, by Next Friend, JOSEPHINE KING,
versus
SOUTHERN RAILWAY COMPANY.

The defendant in this action, in connection with its petition for a writ of error, makes the following assignment of error, which it avers occurred upon the trial of the cause, to-wit:

1. The Court erred in striking the amendment filed by defendant, which was filed on April 24, 1906, and is in these words, to-wit:

"Now comes the Southern Railway Company, the defendant in the above stated case, and, by permission of the Court first obtained,

amends its answer already filed, and says plaintiff should not recover in this case, for the following additional reasons:

Paragraph XIII.

At the time plaintiff alleges she was injured, and for many years prior thereto, and now, defendant controls and operates a line of railroad from the City of Washington, D. C., through the State of Virginia, North Carolina, South Carolina and into and through Georgia; said line forming a continuous line of railroad, the same having been formed under the Act of Congress for the purpose of facilitating commerce among the several States, and the postal and military communications of the United States, and to that end for the purpose of carrying passengers, freight, government mails, troops and supplies from one State into another.

Paragraph XIV.

Defendant further shows that the train which plaintiff alleges injured her was a through train, made up in the City of Washington, D. C. carrying U. S. mail, and an express car of merchandise, and passenger coaches, with passengers going from one State into another; and this defendant by said train was doing an interstate business, under the authority and control of the Congress of the United States.

20

Paragraph XV.

Defendant further shows that the Statute of Georgia, which is in these words, to-wit:

"There must be fixed on the line of said road, at the distance of 400 yards from the centre of each of said road crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road," the violation of which plaintiff alleges as the negligence in this case, is and was inoperative as to defendant's train, which plaintiff alleges injured her, for the reason that it is in violation of Section 8, Article First, of the Constitution of the U. S., which gives to Congress the right to "regulate commerce with foreign nations and among the several States, and with Indian tribes."

Paragraph XVI.

Your defendant further shows that the Statute of Georgia is not a reasonable regulation under the police power of the State to secure the safety of passengers, but that the statute is a direct burden on and impedes the interstate traffic being done by this defendant, and impairs the usefulness of its facilities for such traffic.

Paragraph XVII.

Defendant further shows that it is impossible to observe said statute and carry the mails as defendant is required to carry them under the contract it has with the government; and it is likewise impossible to do an interstate business and at the same time comply with the terms of said statute.

Wherefore, it says that said statute is inoperative as to it, and it should not be required to comply with the same on its interstate line of railroad.

All of which it stands ready to verify, and prays that it be hence discharged with its reasonable cost.

JNO. J. STRICKLAND AND
THOS. F. GREEN,
Defendant's Attorneys.

21 GEORGIA,
Clarke County:

You, Jno. J. Strickland, do swear that you have had charge of the above case since the same was served on defendant, and have filed all of the pleadings for the defendant. At the time of filing the original answer, the defendant did not omit the new facts of defence set out in the amended answer for the purpose of delay, and the amended answer is not now offered for the purpose of delay. So help you God.

JNO. J. STRICKLAND.

Sworn to and subscribed before me, this April 24, 1906.
H. H. SIMMONS,
Deputy Clerk.

2. The Court erred in rejecting the evidence of Ben Dewberry, a witness for the defendant, which occurred as follows:

Ben Dewberry stated that:

"There are between ninety and one hundred crossings on the Southern Railway, between the South Carolina line and Atlanta."

Plaintiff's Counsel said:

"I object to that question and to the answer, because incompetent, immaterial and inadmissible. I think the entire case should be confined to this crossing."

Counsel for defendant then stated:

"I expect to prove that between the South Carolina line and Atlanta, there are practically one hundred road crossings, or between eighty-five and one hundred public road crossings; that the distance is one hundred and one miles; that the crossings in some localities are very close together, and within a few hundred yards of each other, and at others farther apart, but on the average making a crossing to the mile almost. We expect to show further that to observe the statute and check and keep checking so as to have the train under control, and to stop should any person or thing be on the crossing, it would consume from five to ten minutes for each crossing,

dependent, of course, upon the weight and length of the train, and the grade; but it would make an average of seven *of* [or] eight minutes. We wish to show that this train was made up and known as No.
39, the vestibule train which runs from the city of Washing-
22 ton, through the States of Virginia, North Carolina, South Carolina and Georgia; that it was carrying passengers from one State to another, also carrying an express car with freight on it from one State to another. We wish and expect to show that obedience to that crossing act would hinder and practically prevent interstate business being done by the defendant railroad. We wish to show the condition I have just stated all existed at the time this accident occurred, on the 11th of October, 1903.

By the COURT: The testimony will be excluded, and you may have an exception noted to this ruling.

The Court erred in refusing to direct a verdict for the defendant at the close of all the evidence, upon defendant's motion, which was in these words, to-wit:

Now comes the Southern Railway Company, the defendant in each of the above cases, at the close of the evidence in each, and moves the Court to direct a verdict for the defendant in each, upon the following grounds:

1. Because the evidence fails to show that this defendant was guilty of any negligence which was the proximate cause of the injury to the husband of the plaintiff, Josephine King, or to the plaintiff Inez King.

2. The evidence fails to show that the place where plaintiffs were injured was a public crossing, established under as required by law, and a place where this defendant, under the statute of Georgia, was required to check its trains.

3. The evidence shows that the plaintiff and A. O. King, who was the husband of Josephine King, and the father of Inez King, drove on to the crossing without using their sense of sight or hearing to ascertain whether or not the train was approaching, at a time and place where, if they had used either their sense of sight or hearing, they could have discovered the train was approaching and was not checking for that crossing; that after they discovered, or had they been in the exercise of the care of ordinarily prudent persons, would have discovered that the defendant's train would not check for the crossing in question. By the exercise of their senses, they could have then avoided the consequences of defendant's negligence, if any existed.

When the entire evidence is tested by the rule laid down in Lucas v. Brooks, 22 Wallace, 116, to-wit:

23 "The true rule in the case is that if to the judicial mind the evidence tested by the law of the issue, and the rules of evidence, is not sufficient to justify a jury fairly and reasonably in finding a verdict for plaintiff, the Court should so tell the jury."

Wherefore it prays, that a verdict be directed in its behalf.

JNO. J. STRICKLAND AND
THOS. F. GREEN,
Att'ys for Defendant.

Denied and exceptions allowed and noted, Feb. 27th, 1906.
WM. T. NEWMAN,
U. S. Judge.

3. The Court erred in making the charge to the jury, in refusing to state propositions requested by the defendant in the following instance, to-wit:

"1. If you believe from the evidence in this case that at the time the husband of the plaintiff, Josephine King and the plaintiff, Inez King were injured, the railroad was guilty of negligence in that its engineer failed to check and keep checking the train from the blow post to the crossing upon which they were hurt, or in failing to blow the signal as the statute requires, or running at a reckless rate of speed, yet after the negligence of the railroad company began, if it was apparent to A. O. King, that the engineer was not checking the train, or it would have been apparent had he been in the exercise of the care of an ordinarily prudent person, and that said railroad was not in the discharge of its duties as to giving signals of the approach of a crossing, but that it was coming to the crossing at a high rate of speed, if it was in the power of the said A. O. King to have avoided the danger from the negligence of the defendant by the exercise of ordinary care, then neither plaintiff in this case can recover."

"2. I charge you that it appearing from the evidence that A. O. King, the husband, and his wife, Josephine King, and his minor daughter, Inez King were riding in the buggy of the said A. O. King, and being driven by him, that the negligence on the part of the said A. O. King was attributable to his daughter, Inez King, and if, under the rules I give you in charge, such negligence would have prevented the said A. O. King from recovering had he sued, the same would prevent either Josephine King or Inez King from recovering."

—. "I further charge you, that, if you believe under the evidence in the case, that the plaintiff, Josephine King, and her daughter, Inez King, and her husband, A. O. King were driving in a buggy approaching the crossing where they were injured, and, if you
24 further believe that they stopped and looked or listened they would have discovered the approach of the train in time to have avoided the negligence of the defendant company in failing to check or in any other negligence being committed by it, and you further believe that they went on such crossing without having stopped and listened or looked for the approach of the train, then I charge you that neither Josephine King nor Inez King can recover in this case."

4. I further charge you that the care to be exercised by the said A. O. King in approaching the crossing and railroad track is that care which an ordinarily prudent person would exercise for his own safety. What would or would not amount to negligence in the manner in which a person entered upon a railroad track would depend to a large extent upon the peculiar location of the place at which he went upon the track. An ordinarily prudent person in the possession of all his faculties would (should) not attempt to cross a railroad

track at any place without at least using his sense of sight, *of* [if] not that of hearing, to discover whether at the time and place he was about to cross the same, there were present any of those dangers which a person of ordinary intelligence would reasonably apprehend."

NOTE.—The Judge gave this request in charge, except he substituted the word "should" for the word "would" which as movant insists, changed the whole force of the charge.

5. I further charge you that, if you believe from the evidence that A. O. King had stopped immediately before crossing the railroad, that is, a few feet from it, and had looked, that he would have discovered the approaching train for a considerable distance, and he went on the track without so looking, when, if he had looked, he could have discovered the approach of the train, or, if he had stopped and listened, could have heard its approach and thus avoided the accident, then I charge you that neither plaintiff in this case can recover.

6. If you believe from the evidence that the view from the direction in which the train was coming near the crossing was so concealed that A. O. King could not see whether or not the train was approaching, then I charge you an ordinarily prudent person under such circumstances would have stopped and used his sense of hearing, and, if you believe this condition existed, and A. O. King drove on the crossing without having stopped and listened, and, if he had listened, would have heard the approaching train in time to have avoided the injury, then I charge you neither plaintiff in this case can recover."

7. "If you believe from the evidence that A. O. King did discover the approaching train before driving onto the crossing, and yet drove on believing that he could cross before he was struck, then I charge you that neither plaintiff can recover."

8. The rule of law given you as to the duty of railroads to blow and check, etc., at crossings only apply to the crossings at public roads established according to law."

9. "Unless the evidence satisfies you that there is either an Act of the Legislature of Georgia, or a judgment of an inferior Court of ordinary, or the County Commissioners of Roads and Revenues, of Habersham County, establishing the road in question as a public road, or the evidence satisfies you that the road has been in continuous use as a public road for twenty years as it now is located, then under the law the road in question is not a public road such as the law contemplates, when it requires the railroad to blow for the crossing. This is true, regardless of whether or not there was a blow post or crossing signal, or how the railroad company itself had been treating it."

10. "If you believe from the evidence that Dewberry, the engineer saw the Kings going towards the crossing, but in a safe place, he had a right to presume they would not go on the track, and there was no duty on the engineer to take any steps in regard to them until it was apprehended they were in danger or intended going on the track."

5. The Court erred in limiting the argument in the case to one

and one-half hours to the side. Practically four days have been consumed in putting in the evidence and two cases being tried together.

6. The Court erred in delivering his instructions to the jury during a terriffic hail storm.

7. The Court erred in using the following language in the charge to the jury:

"Under the Statute of Georgia, gentlemen, which has been referred to, it is the duty of the engineer- of trains in Georgia, when approaching a crossing to blow the whistle as has been stated to you by counsel, and to check and keep checking their trains as they approach the crossing, so as to be able to stop them, if any per-
26 son or thing should be upon the crossing. That is the Statute of this state, and it is entirely clear that they were not doing that in this case, so there is no question that the railroad, through its servants, agents and employees, was guilty of negligence.

I, therefore, charge you as a matter of law, that the defendant through its servants, agents and employees was guilty of negligence."

Wherefore for the errors herein assigned, the defendant, the Southern Railway Company, prays that the verdict and judgment of the Circuit Court against it be set aside.

JNO. J. STRICKLAND,
Att'ys for So. Ry. Co., the Def't.

Filing: U. S. Circuit Court. Filed in clerk's office Nov. 17, 1906. O. C. Fuller, Clerk.

Acknowledgement of Service.

In the United States Circuit Court for the Eastern Division of the Northern District of Georgia.

INEZ KING, by Next Friend, JOSEPHINE KING,
versus
SOUTHERN RAILWAY COMPANY.

We acknowledge due and legal service of the petition for writ of error, the order allowing said writ of error, the assignment of errors filed therewith, the writ of error, and the citation issued thereon in the above stated case.

This 17 day of November, 1906.

REUBEN R. ARNOLD,
HOWARD THOMPSON,
Plaintiff's Attorneys.

Filing: U. S. Circuit Court. Filed in clerk's office Nov. 17, 1906. O. C. Fuller, Clerk.

Bond.

GEORGIA,
Clarke County:

Know all men by these presents, That, we, the Southern Railway Company, as principal, and J. W. English, as security, are held and

firmly bound unto Inez King, by her next friend, Josephine King, her certified attorney, heirs, executors and administrators in the sum of twelve thousand ($12,000.00) dollars, to which pay-
27 ment well and truly to be made, we bind ourselves, our heirs, assigns, executors and administrators, jointly and severally by these presents.

Sealed with our seal and dated this the 17 day of November, 1906.

Whereas, lately at a Circuit Court of the United States, for the Eastern Division, of the Northern District of Georgia, in a suit pending in said Court between Inez King, by her next friend, Josephine King, plaintiff, and the Southern Railway Company, the defendant, a verdict by a Judge and judgment was rendered against the Southern Railway Company for $8,000.00, which was written off by plaintiff's counsel down to $6,000.00, and the said Southern Railway Company having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Inez King by next friend, Josephine King, citing and admonishing her to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit, to be held at New Orleans, La., within thirty days from the date thereof.

Now, the condition of the above obligation is such, that, if the said Southern Railway Company shall prosecute said writ of error to effect, and answer all damages and cost, and pay the eventual condemnation money, if it fail to make its plea good, then the above obligation to be void, else to remain of full force and effect.

[L. S.] SOUTHERN RAILWAY CO.,
By JNO. J. STRICKLAND,
Att'y of Record.

[L. S.] J. W. ENGLISH, *Security.*

Signed, sealed and delivered in the presence of
J. M. MILAM.
STEWART McGINTY,
Notary Public, Fulton Co.

Order Approving Bond.

This bond is approved and it is ordered that the same operate as a supersedeas, and that judgment be stayed until the United States Circuit Court of Appeals for the Fifth Circuit pass upon the writ of error sued out by the said Southern Railway Company.

WM. T. NEWMAN,
U. S. Judge.

This 17 day of November, 1906.

Filing: U. S. Circuit Court. Filed in Clerk's office, Nov. 17 1906. O. C. Fuller, Clerk.

28 *Bill of Exceptions.*

In the Circuit Court of the United States for the Eastern Division of the Northern District of Georgia.

No. 26.

INEZ KING, by Next Friend, JOSEPHINE KING,
vs.
SOUTHERN RY. CO.

Be it remembered, That on the trial of this cause in this Court, at the April term, 1906, of said Court, the Honorable Wm. T. Newman, Judge, presiding, *when* the following proceedings were had, to-wit:

The Southern Railway Company, the defendant, filed an amendment to its answer, which on oral demurrer was on April 27th, 1906, dismissed. Amendment and order being in words as follows:

In the Circuit Court of the United States for the Eastern Division of the Northern District of Georgia.

INEZ KING, by Next Friend, JOSEPHINE KING,
vs.
SOUTHERN RAILWAY CO.

Suit for Damage.

Now comes the Southern Railway Company, the defendant in the above stated case, and by permission of the Court first obtained, amends its answer already filed, and says plaintiff should not recover in this case, for the following additional reasons:

Paragraph XIII.

At the time plaintiff alleges she was injured and for many years prior thereto, and now, defendant controls and operates a line of railroad from the City of Washington, D. C., through the State [States] of Virginia, North Carolina, South Carolina and into and through Georgia; said line forming a continuous line of railroad, the same having been formed under the Act of Congress, for the purpose of facilitating commerce among the several states, and the postal and military communications of the United States, and to that end for the purpose of carrying passengers, freight, government mails, troops and supplies from one state into another.

29 Paragraph XIV.

Defendant further shows that the train which plaintiff alleges injured her was a through train made up in the City of Washington, D. C., carrying U. S. Mail, and an express car of merchandise, and passenger coaches with passengers going from one state into

another; and this defendant by said train was doing an interstate business, under the authority and control of the Congress of the United States.

Paragraph XV.

Defendant further shows that the Statute of Georgia, which is in these words, to-wit:

"There must be fixed on the line of said road, at the distance of 400 yards from the centre of each of said crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof so as to stop in time should any person or thing be crossing said track on said road," the violation of which plaintiff alleges as the negligence in this case is an- was inoperative as to defendant's train, which plaintiff alleges injured her, for the reason that it is in violation of Section 8, Article First, of the Constitution of the U. S., which gives to Congress the right to "regulate commerce with foreign nations, and among the several states and with Indian tribes."

Paragraph XVI.

Your defendant further shows that the Statute of Georgia is not a reasonable regulation of the police power of the state to secure the safety of passengers, but that the statute is a direct burden on and impedes the interstate traffic being done by this defendant, and impairs the usefulness of its facilities for such traffic.

Paragraph XVII.

Defendant further shows that it is impossible to observe said statute and carry the mails as defendant is required to carry them under the contract it has with the government; and it is likewise impossible to do an interstate business, and at the same time comply with the terms of said statute.

Wherefore, it says that said statute is inoperative as to it, and it should not be required to comply with the same on its interstate line of railroad.

All which it stands ready to verify and prays that it be hence discharged with its reasonable cost.

JNO J. STRICKLAND AND
T. F. GREEN,
Defendant's Att'ys.

GEORGIA,
Clarke County:

You, Jno. J. Strickland do swear that you have had charge of the above case since the same was served on defendant, and have filed all of the pleadings for the defendant. At the time of filing the original answer, the defendant did not omit the new facts of defense set out in the amended answer for the purpose of delay and the amended answer is not now offered for the purpose of delay. So help you God.

JNO. J. STRICKLAND.

Sworn to and subscribed before me, this April 24th, 1906.

H. H. SIMMONS,
Deputy Clerk.

The jury was empanelled and sworn according to law, to try the above case, the same being an action for personal injuries received at the hands of the railroad at a crossing. The trial of said case begun on April 27th, 1906, and the following evidence which relates to, bears upon and is material to the errors complained of, was introduced in the presence of the Court and jury.

31 *Record.*

In the Circuit Court of the United States for the Northern District of Georgia, Eastern Division.

No. 21.

Mrs. JOSEPHINE KING, Plaintiff,
vs.
SOUTHERN RAILWAY COMPANY.

No. 26.

Miss INEZ KING, Plaintiff,
vs.
SOUTHERN RAILWAY COMPANY.

Before Hon. W. T. Newman, Judge Presiding, and a Jury.

Appearances.

For the Plaintiff, Reuben R. Arnold, Esq., Howard Thompson, Esq.
For the Defendant, Messrs. Strickland & Green.
R. A. Henderson, Official Reporter.

Mrs. JOSEPHINE KING, a witness called and sworn in her own behalf, and in behalf of Miss Inez King, testified as follows:

Examined.

By Mr. ARNOLD:

I am plaintiff in one of these cases. I live in Banks County, Ga. My husband's name was A. O. King. An accident happened to him on Sunday, October 11th, 1903, in which he met his death. Myself and daughter were with him when he was killed. My husband, daughter and myself had been to church that day. The church was about two miles and a half from our house. The church was in Habersham County, Ga. We had to cross the tracks of the Southern Railway on our way home from church.

We cross the track at what is called Mag Wade's Crossing. The road is called the Clarksville road I reckon.

Q. Is that a public road?

32 Mr. STRICKLAND: I object to that question. This witness cannot give her opinion as to that. The public records would be the best evidence.

By the COURT: I think she can answer. Objection overruled.

WITNESS: Yes, it is always called a public road. I have known it as a public road all my life, I reckon. I was fifty-four years of age last May, I believe. Yes, we made the trip safely to the church on that morning of the 14th of October. We started from home between nine and ten o'clock in the morning, I reckon. We got there before the services, and they always commence at eleven o'clock. We left the church after the services were over. I reckon we stayed about an hour and a half; I don't know. Yes, I reckon about half past twelve is the time we left the church. We were driving a mule and buggy; a one-horse buggy, and a one seated buggy. I was sitting on one side, my husband on the other and my little daughter in between us; that's the way we always carried her. On the way home we crossed at the same crossing, Mag Wade's crossing. There is a hill away along up there before we get to the crossing, all filled with bushes, and we could not see the train over the bank and bushes. As we approached that crossing we listened for the train. No, we could not see up the way the train was coming on account of the bank and the bushes. Yes, we looked in both directions. No, we did not see the train as we approached the crossing. I could not see up the road for them bushes on the bank, and we went right on and drove up to the track, and I looked for the train, and just as I looked, the train blew, and that is the last I knew. I recollect my husband trying to rush the mule across. The train looked to me as if it was right at us. No, I had not seen nor heard it until then. I could not tell you how high that cut is there, but there is a cut there. I really don't know how high it is, but I reckon it is some twelve feet, or something like that. No, I had not heard the train at all before it gave that blast just as it hit us. It blew two short blasts. We had no chance after that to get out of the way. The last I remember my husband doing, he tried to rush the mule across with the lines. I do not know what part of the buggy the train hit; I cannot tell you.

The buggy was torn up; that's what everybody told me, I
33 was thrown on the ground, my daughter was thrown on the ground, too; my husband was thrown on the ground just by a post there. Yes, we were all thrown to the ground. No, my husband was not killed when I went to him. I don't know how long he lived, but they told me he lived an hour or two. Oh, yes, he died. I don't know how long I was unconscious. They took me to my home. No, I was not able to see my husband buried. My daughter Inez was left in a mighty bad condition. My husband's age was sixty-two years. My husband before that time put in all the time he was able to work and labor. He was not very stout, but he put in all the time he could to make a support for his family. His business was farming. He plowed and hoed and cut wood, and

such as that. Yes, and he hauled wood. He had two tracts of farm land, and he looked after those farms. I don't know that I can say what his labor was worth by the year, but he kept a support for us. There was just three of us at home there. I reckon his services were worth five hundred dollars a year. In one farm there was a hundred acres, and in the other mighty nigh two hundred acres. He had pretty near three hundred acres of land. Yes, he looked after both places. In front of our buggy, there was a hack and a one-horse wagon. Taylor Dodd and his wife was in the hack and Willie Dodd and Frank Irby was in the wagon. After the accident, my little girl stayed up and kept trying to go. She was not staying up all the time; she would lie in bed part of the time, and making an effort to get around. She was doing her best to get around for a week or two. She got worse all the time, until she could hardly walk, and could not breathe hardly. Her back and sides seem to be her greatest trouble. No, sir; I never did undress her and look at her person, when I got her home. Yes, I was in [a] bad condition. Yes, Inez certainly did finally get down. For a week or two after the accident, she kept trying to go as long as she could. When she got down, she was not able to do anything. Of course, she took to her bed. I don't know how many days she stayed in bed. No, she has not been able to walk or work, or do any bodily labor since. She is in the roller chair, because she is not able to walk but a few steps at a time, and that worries her. Yes, she can stand a little while. No, sir; she cannot do any work, or to labor now like she used to. Before, she used to do all the washing, helped me cook, done all the ironing, milked the cows, helped her pa hoe, or do anything he wanted her to do. During the two or three weeks
34 she was up and about ailing, she might have tried to wash the dishes, and I think she did try to make up the beds. After she had got down, she had not been able to do anything of that kind. She has not been of any service to herself or to my family. I have to take care of her and wait on her all the time. She cannot dress herself; her clothes have to be handed to her. Her age at that time was fifteen years.

Cross-examination.

By Mr. STRICKLAND:

I could not tell you the time of day the railroad train struck our buggy, but I reckon it was some time about one or two o'clock. As we went down towards the railroad, I did not hear any train. I was looking for the train, and listening for the train. I could not look *look* up that way for the bank and bushes, but there was nothing in the world to hinder me from looking at the track all the time. I could not help looking down the track, because there was nothing in my way. I could not see up that way on account of the bank and bushes, until I got right by the railroad there. Before reaching the railroad track, it is not very far to the place where I could see up the track. When I got right on the track, I could look up it. No, sir; I don't think I could have look-up the track ten or fifteen steps from the track, for all them bushes.

I don't know that there was a space of twenty steps along the road before we got to the railroad crossing, at any point of which I could have seen the train approaching from the north, had I looked. I was listening all the time. As to distance, I could not tell you whether there is a space of sixty odd feet before reaching the track, that I could have seen the train. You could not see the train until you got right on the track there. The bank and bushes would prevent me seeing it. Yes, there is an excavation there, where there is a sand pit, or something cut out there. That pit is just above the crossing. There is a bank there, and the bushes are all over it. The bushes are all along there, plumb across. You had to be on the track before you could see the train. I did not have anything to do about my husband hurrying up the mule. What I said was, the last I remember was, he tried to rush the mule with the lines. He never said anything to me, or me to him. I did not motion to him, or hurry him up. I just looked and saw the train, and just as I looked up it blowed two short blasts. I just turned my head to my husband; I recollect that, and just as I done that he tried to rush the mule across. He tried to rush the mule with the lines, I think that's the way. Before that I had not looked up the track and saw the train approaching. We just got right there and I looked up the track and just as I looked, it blew two short blasts. It then looked to me as if the train was right at us. I was listening for the train all the time, for I never do cross unless I listen. We never stopped before going on the crossing. I was listening all the time, and that is the reason we did not stop. We were just walking on across the track. Yes, my husband had two farms. He rented them out, and some he tended hisself [himself]. Yes, he made a crop himself, and rented out the rest. He had no one to help him make the crop, except the little girl; he did the plowing himself. No, he did not have as good health as he used to have, but he had very good health, I reckon, for his age. Of course, he never was as stout as he was before the war. I think it was sixteen years before he was killed, that he applied for a pension. No, sir; he did not apply for a pension a year or two before he was killed. I don't know that Mr. Brown made application for a pension for him. I do not know how much my husband made a year, but he made a support, what we all lived on; what me and my daughter and he lived on. Yes, the farms paid a certain rent. He had two hundred acres in one farm and one hundred acres in the other. What he got from the farms, and what he made himself was the support. It took what he made to support us; perhaps some little things over and above. Yes, I was also hurt in the accident. They carried my daughter and me home in a wagon, I think. Yes, after we got home, I reckon Miss Inez did set up, she set up a week or so, I think. Yes, she tried to help me in the house work all she could. I don't think she went to the spring. She tried to do everything she could, but she did not feel able to do anything. She may have milked along at the start. She might have helped cook some at the start, but not very much I don't reckon. For a week or so she kept up. I don't recollect how long. She could not do very much. She tried to walk around and

do little things; tried to make up the bed; tried to wash dishes and then laid down. That's the way she did. I don't know what she did about playing with a baby that some one had there when she was up. Yes, when she was first hurt I had a physician examine her. I had Dr. Quillian, and a doctor from Gainesville (I forget his name), Goss, I think. Yes Oslin is the name I think.
36 I don't know whether there was another doctor or not. After ward Dr. Hathcock gave her medicine. Dr. Hathcock came to see her when she first took to her bed. Yes, I sent for him. I reckon directly [after] the accident occurred, I employed counsel to bring suit. I cannot tell you how many days after the accident. I don't know whether it was a week or not; it was not very long I don't think. Yes, Dr. Hathcock came and examined her. He treated her five or six months, or seven months. I don't recollect how long. He came off and on for a long time. Yes, I remember the time Dr. Hathcock, Dr. Goss and Dr. Ham were there to see her. I think that was along in January, sometime, after she was hurt in October. I wanted Dr. Ham, but never sent for Dr. Goss. I wanted another doctor besides Dr. Hathcock. I don't know whether I sent for Dr. Ham. Mrs. Thompson told me it was best to have another doctor. I selected Dr. Ham; I wanted another. I had been talking about Dr. Ham before Mrs. Thompson named him. Dr. Hathcock never named it to me to have another physician to come in. At the time Doctors Ham, Hathcock and Goss were there. Dr. Quillian had not been there for a good little bit; only Dr. Hathcock. Dr. Quillian came in just after she was hurt. After Dr. Quillian left, Dr. Hathcock came in. I don't recollect exactly how long after she was hurt before Hathcock came. He treated her a good long time. He is the only one who treated he- at all until the board of doctors came. Then Dr. Hathcock still kept on treating of her. Dr. Ham has been the only one who have been treating her since. I cannot tell you how long. Dr. Ham has not seen her for good while; I guess it has been three months. He has not been there since last spring. It was not though, because I didn't need him. I suppose it has been over a year. The last time he was there before last spring, was when he put the plaster jacket on Inez with Dr. Quillian. That's the way I think it was. It has been so long I may forget things. Ham and Dr. Quillian put a plaster jacket on her, and I don't think he has been there since that, until he came last spring. Yes, I testified in Habersham Court, in the other trial that Inez had not been able to walk at all since she was hurt, but I never thought much about anything; her hurt or mine either. No, I did not state in that trial that she had not been able to walk since she was hurt. I said she tried to do it, but laid in the bed most of the time; complaining all the time, but trying
37 to make up the beds and wash—I don't think I stated on the former trial that "the only walking Miss Inez did since she was hurt was to turn her feet off the bed on to the floor, and get to the roller chair." I think I said she took a few steps at a time. Yes, since Miss Inez has been hurt, she has lived at my house all the time. She stays in the house all the time. She is in bed or in her chair all the time. No, sir; she does not get out in the sun-

shine; I take her out myself, roll her around and take her out on pretty days. She trys to do that herself, yes. Yes, I was there when Doctors Ham and Quillian put the plaster jacket on her. Yes, they swung her up to the joist in some way, to put it on, and the nail broke loose. She did not fall, we caught her. I held her by the arm. She can stand on her feet. I never said she could not; I was holding her, though. Me and my daughter are rooming together at the hotel or boarding house. It is not true that she walked about the room last night; just stepped from her chair that way. No, she did not walk from one end of the room to the other; no, sir.

Redirect examination:

No, sir; my husband was not a preacher; he exhorted, though. I don't know whether my little girl was in the bed first two or three days, or not. She was trying to walk around, doing all she could.

Miss INEZ KING, called and sworn in her own behalf and in behalf of her co-plaintiff, testified as follows:

Examined.

By Mr. ARNOLD:

My name is Inez King, and I am seventeen years old. The lady who just left the stand is my mother. Yes, I was present when my father was killed, and mother and I thrown out of the buggy. We got to the church that morning about nine or ten o'clock. No, we got to the church about eleven o'clock and stayed, I reckon, some time near twelve or one o'clock. Then we went back home. I was sitting between my father and my mother in the buggy. There is a bank right there at the crossing. I don't know for certain just how high the bank is, but it is twelve or thirteen feet high, I reckon. Yes, the railroad goes between two banks; what is called a cut. Yes, there were trees on the bank or hill then. As we come around by the crossing, we did not have a view to the north,
38 the way the train was coming for the bank and trees. Yes, it shut off the view of the train until we got right down to the track. There was nothing to hinder us from seeing a train coming from the South. I did not see any train approaching either way, until just as we drove upon the track. Yes, we listened and took heed of our surroundings. I did not see or hear any train coming. I did not see the train until just as we were on the track. I don't know just how close the train was to us then, but I reckon something like twenty yards perhaps. Just as I seen it, it blowed just two little short blasts. After it blowed two little short blasts, we did not have any chance to get out of the way. My father slapped the mule with the lines to hurry up the mule. The mule stepped on across. I don't know for certain what part of the buggy was caught. The mule got out of the way, and the front wheels of the buggy the train caught. When the train hit the buggy we were thrown out. I was thrown on the ground. I cannot tell how high up I was thrown; I don't know; I fell right on my back. It was a hard fall. Mother was thrown on the ground. Father was thrown on the ground. I don't know what

part of my father struck the ground. The first thing I knew was, I hit the ground, from the time I saw the train. I came to as I hit the ground. My father was dying when I came to. He was lying on the ground. I don't know whether he was conscious or unconscious. He laid there I think, until he died. Yes, he died on the ground. I don't know how long he lived; but they say he lived an hour, I think. I was sitting there when he died. After I got home I found out where I was hurt. My hip was hurt, and I was hurt in the chest. I was hurt in the hip (indicating), right here, and it went around to my back and spine. The next day I was hardly able to do anything, but I tried to. I dragged around, trying to do something as long as I could. I cannot say for certain, but I think it was something near two weeks before I was taken down to my bed. I took to my bed because I was not able to stay up. The weakness and pain that kept me from going around, struck me in the back and side. Since I took to my bed I have not been able to do any physical work at all. I was in bed six or seven days before I tried to sit up. I now get around in this chair. The effect of trying to walk, it just worries me, and makes me so nervous I cannot hold my body still. Yes, I have spells of nervousness. I have them every day. When I have these nervous spells, it makes me so weak all over and everything, I cannot hardly live; and it causes my back to hurt awful bad, and my head
39 too. I am suffering pain in my back right now. I can stand but a little while at a time. Before this accident, I was always able to go and do what work I wanted to. I was fifteen years old when this happened. Before the accident I could wash, iron, cook, starch, sew, milk cows, hoe cotton, pick cotton. I cannot do any of that now. Yes, since I have been confined to my bed and my chair, I have made efforts to walk and to stand, but am not able to do it more than a few steps at a time. I am obliged to use this chair to get about with any comfort. I move it by rolling the wheel this way, and sometimes I am not able to do that; it makes me nervous. Yes, I go from one room to another at home, in this chair, all the time. I get better at times. Sometimes I feel a little better, and sometimes I feel so bad I cannot sit up, and then I take to my bed. I said I had those nervous spells almost every day or night. I cannot sleep for my nervousness. (Here the witness exhibits to the jury the manner in which she moves around in her roller chair.)

Cross-examination:

At the time we were going along in our buggy, there was a wagon and a buggy in front of us. I don't remember at what gait they or we were traveling. I don't remember whether the mule was trotting or not, for certain. Before getting to the railroad, there was an embankment which we went down, and that embankment prevented us seeing the train coming from the north. I don't know for certain how far it is from the bottom of that little embankment to the railroad track. It is something like ten steps I reckon. Anywhere, in that ten steps you could see but a little piece up the track. I don't know how far I could see. Yes, I could see a little piece. In that ten steps there is nothing to prevent me from seeing up the track. If I had been looking for a train when I was anywhere in that space of

ten steps, I could have seen the train coming just a little piece. I don't mean by a "little piece" two hundred yards. I reckon it would be two hundred feet. That curve I suppose cuts off the view beyond. Beyond the curve, I suppose that cut prevents a view of the track. I don't remember the depth of the cut, I have not been there in so long. No, sir; we did not stop on the crossing. Yes, I looked up the railroad at one point. I don't remember where the buggy was at when I looked up the track. It was before we had gotten on the crossing though. Yes, I then looked up as well as I remember. I don't know whether my father looked up the track, or not.
40 I don't know what my mother did. When I looked up I did not see anything of the train, nor hear anything of it. No, we did not stop and listen but there was nothing to keep us from hearing the train if we didn't stop. No the horse and buggy was not making much fuss. I don't know what we were talking about. No, we had not been to a wedding that day. Yes, we were with a man and his wife who had just married. I don't know whether we were talking about that, or not. No, sir; I don't think I could have seen the train coming, if we had stopped anywhere within ten steps I spoke *if*, and looked up the track. You could not see any piece; it would have been right on us before we could see it. I don't know whether we could have heard the sound of the train running if we had stopped. Yes a running train makes a noise. If it made any noise, I never heard it. There was nothing to keep us from hearing. Yes, the train was right at us. My father's, my mother's and my own hearing was good. I could see all right at that time, and my mother and father could see well too. Just as I hit the ground is the first thing I remember. Just as I seen the train, just as we drove on the track, I don't remember anything more. I looked as it blowed. I don't know what struck me. It struck the buggy. I was thrown out and struck the ground. There was nobody helped me up. I got up myself. I was carried home in a wagon. After I got home that night, I helped get supper. I done something. I think I fixed the table for it, and cut some meat and fried it. I stayed up two or three weeks, and during that time I did what I could about the house. The evening we were hurt Dr. Hathcock examined me and Dr. Oslin that evening and next morning Dr. Quillian and Dr. Oslin was there, and Dr. Hathcock was not there; I took medicine from Dr. Hathcock from that night for three or four weeks. I don't remember the next time Dr. Hathcock was sent for. He was coming there all the time treating mother, and I was taking medicine from him. Yes, Mrs. Masters came over to see me in a week or two after I was hurt, and then Dr. Hathcock came to see me. He then came for about six or seven months. No, until then I had not been going where I pleased, but I got about as much as I could. Yes, then Dr. Ham came to see me. Dr. Goss, Dr. Ham and Dr. Hathcock were all there together at one time, and made an examination of me; I think that was about two years ago. I don't remember when Dr. Ham came to see me next, after they left. No, it was not the next time he came to see me, that he put me in a plaster — paris jacket. I don't remember
41 just the day of the month he did that but it was in August, I think. Yes, he and Dr. Quillian did that. I don't remember

how long after I was hurt that I got this chair. Colonel Thompson furnished it to me; he sent it over to me from Gainesville. Yes, that was after he was employed. I don't remember how long after. I got the chair after the time I saw Dr. Hathcock, and after I took to my bed. It is my back and side hurts me when I walk. Yes, I have the use of my limbs and my feet, but my back and side hurts me. No, sir; I don't walk about the room; can only take a few steps at a time. In dressing and undressing, I do that in my chair. Yes, I stay in the house most of the time, only when my brother or some one else carries me out. Yes, I have been there most of the time since I was hurt.

Redirect examination:

Yes, my brother or some one else takes me out in the sunshine sometimes, or my mother does. Until I got this roller chair. I had to sit in a plain chair. Yes, I listened and failed to hear that train. The train goes through a cut there, and I was coming around the brow of the hill on the dirt road. I suppose our buggy was a spring buggy. That dirt road is a good, easy road, so far as I know. There was not anything there to make a rattling sound to drown the noise of the train. If my mother and brother are not at home, I would have to sit where I was, if it was not for this chair.

M. M. FRANKLIN, a witness called and sworn in behalf of the plaintiff, testified as follows:

I live in Habersham County, about eight miles north of Clarksville. On the 14th of October, 1903, I was a passenger on a train of the Southern Railway, which killed Mr. King. I boarded the train at Cornelia, Ga. Yes, I have noticed Mag Wade's crossing. It is known as a public road crossing. It is a road which is traveled right smart. I have noticed whether the railroad put up a sign there, "public crossing." I have seen a blow post near there; I don't know how far it is from the crossing, but I suppose something like four hundred yards away. There is one north, and one south of the crossing. The first thing I knew of the accident, I had struck up with a gentleman I had not seen for eight or ten years, and he told me there was a woman and baby killed. He saw the accident. He
42 was sitting on the left hand side, and I was on the right. After the train stopped and backed back, I was the first one off the train. There were others on the dirt road; but I was the first one to him; helped pick him up and toted him across the road and placed him in the shade. He was breathing then. I don't know how long he lived, but I heard afterwards he lived forty minutes. His wounds were between the shoulders, badly hurt, and his right thigh, as well as I remember, seemed to be hurt. The buggy was demolished; the hind part, divided it between the two wheels, simply tore that to trapsticks. The mule went on some distance from where the accident occurred and turned off into a cotton field. As to the coach I was in, I cannot say positively, but I think I was in the third coach from the engine. The train approached that crossing very fast. It did not stop up one bit, that I could tell. I hate to say how

fast the train was running, but somewhere between 45 and 60 miles an hour. This would be simply guess work on my part. I have ridden on trains, and have seen them run, and that would be my best judgment. I heard the train blow, but whether it was for this crossing where the accident happened or the crossing before that, I don't know; but I am certain it blowed for one or the other of those crossings. The other crossing is north of this one, as well as I can guess, about half a mile. I cannot say I heard it blow for this particular crossing, positively. No, I did not hear two short blasts. I was engaged in conversation, and I did not think of any accident, and was not looking out for that. They did not check up for that crossing, so far as I could tell. I think the engine must have gone 250 or 300 yards beyond the crossing, but that is simply guess work again. I never measured it. It seemed to me the train was running faster than any train I was ever on. The first thing that called my attention to the train running so fast, the gentleman sitting before me raised up and said, "why in the world is the train running so fast," and that caused me to notice it. I had not particularly noticed how fast the train was running until he called my attention to it.

Cross-examination:

No, I had no way of measuring the speed of the train, and I am not prepared to state that it was not running on its schedule. They called it to be on time at Cornelia, but other people reported it to be five minutes late at Cornelia; the sign board at Cornelia said "On
43 Time." The place where this accident happened is two or three miles from Alto, but I don't know how far it is from Cornelia. I think we passed Alto when the accident happened. Yes, at the time this accident happened my friend was telling me a woman and child was hurt. Yes, I mean at this accident. He was sitting by the window, and he thought it was a woman and baby. The train went between 250 and 300 yards beyond the crossing, and it may have been further than that. I mean the front end of the train went that far. I walked back to the crossing, but as for giving it an investigation, I did not. From the foot of the little hill going in the direction Mr. King was driving to the track, you can see quite a distance going towards Atlanta; but looking towards the way the train was coming, my recollection is that from the crossing a person could not see very far up the track on account of that curve. I don't think I went more than ten steps from the crossing on the dirt road. From that point I think I could see up the track some distance, but I don't remember how far I could see. The curve coming towards Atlanta was below this crossing, and my recollection is back towards Cornelia it still curved some. I could not say how far I could see north up the track from that crossing, or ten feet from the track on the crossing, because I did not examine back that way. At the time this accident happened there was a neck of woods on the right hand side, close to the crossing. The dirt road went up a hill, and my recollection is down to the right of way is in small timber. Yes, that is on the left as you look north. After you get by that timber, and get down to the ten steps we are talking about, and looking up the track, that timber is to the left. It seems to me, as well as I remember the

road, looking north, curves to the left; but, Colonel, I cannot tell you, for I did not examine that part of it.

(Witness is handed a plat.)

Standing on the crossing, and looking to the north, this makes the road curve a little to the right. Standing within the space of ten feet from the railroad track on that crossing, and looking north, there is no woods or anything else between my sight and that curve. The distance I went back from the track on this crossing, there was nothing to prevent me from seeing up the track almost half a mile, so far as I remember.

44 Redirect examination:

I think I went back from the track something like five or ten steps. I only went back a few steps. Below that crossing, I went back on the railroad. No, I did not step out from the track on to the dirt road to see how far I could see up the track at all. As I said, I never examined the road but very little. I never thought of it being called in question, or to give evidence about it. Yes, the dirt road makes a bend around a hill just before you get to the track. All that scope in here, between the right of way and here is small timber, and it runs up to where the road turns around that way. No, I could not swear how far I could see a train up to the time I got on the track, coming towards it.

Recross-examination:

If I was standing between the foot of that little hill and the railroad track, I think I could have seen a train, until this road makes the bend. Before the train got to the bend, the timber would prevent me from seeing it.

(Witness handed a plat.)

As well as I can see now that object there is the blow post. As I told you before, I did not examine north of the crossing up the railroad track, and don't want to swear how far I could see a train, because I don't know.

W. T. Dodd, a witness called and sworn in behalf of the plaintiff, testified as follows:

I recollect the occasion when Mr. King was killed, in 1903. I am Mr. King's son-in-law. I was driving a short distance ahead of his that day; something like 25 yards. As I went around the brow of that hill towards that crossing, I could not see up the track. I would have to get within eleven steps of the track before I could see up it. When I got within eleven steps of the track I could then see up it about 200 or 250 yards. Beyond that, some timber shut off the view. Yes, the track curved. No, as I went along ahead of him that morning, I did not hear any train coming. The old man was in sight, behind me. No, I did not see any train. The first I knew of a train coming, I heard two short blasts, as they run into him.
45 It hit the hind wheels of the buggy. He had gotten the mule and the front wheels over, before it hit him. I saw him jerk

up the lines and slap them down on the mule. The train knocked the old man down the road. He hit the sign board post. That board had on it "Look out for the engine" I believe. No, I reckon it was railroad crossing. That is the thing he hit. (To the Court:) He hit the post that holds up the sign, down about the ground. (To Mr. Arnold:) No, his head did not strike the post. He lived about an hour I reckon. The old lady struck in the road out in front, and the girl struck in the road, too. The girl hit the road on the flat of her back, I think. She was knocked up in the air a right smart piece; something like ten or twelve feet, I guess. I could not say how fast the train was running over that crossing, but I should estimate it something like fifty miles an hour. I could not tell that it checked up for that crossing. I did not hear them blow for that crossing up to the time I heard the two short blasts, just as they were hit. There was nothing that I know of to prevent me hearing it. No, I did not hear the rumbling and rolling of the train before that time. I have seen a blow post north of the crossing, but I didn't know how far it is from the crossing. Yes, we were driving on a public road. I was in a one-horse wagon, with my wife, with Irby and his wife; in the buggy ahead Taylor Dodd and his wife. My wagon and the buggy passed over the crossing without hearing the train.

Cross-examination:

At that time I lived a mile and a half from this Mag Wade Crossing. I have been living there about six years. Mr. King lived about a quarter from my house. Both lived about the same from the crossing. Yes, he and I were familiar with this crossing. I did not have any time with me, but of course I knew that train came down in the evening. I knew about the time it came. I don't know whether Mr. King knew it or not. Mr. Irby and I were in the wagon together. Yes, I reckon Irby was familiar with the crossing. No, sir; Irby did not state to Mr. King, "It is time for 39." He did not say the "Vestibule is due," that I know of. If there was anything said about any train being due, I did not hear it. Taylor Dodd was in front of me. Yes, he was married that day. He was in a buggy, and we four were in the wagon. Mr. and Mrs. King and Miss King were in the buggy behind me. I trotted down that hill to the crossing and Mr. King kept up, I think trotted down that little
46 slant. No, Mr. King did not stop before going on that crossing. No, he did not stop and look, and did not stop and listen, if he had stopped and looked just before going on the crossing within the eleven steps I spoke of, I guess he could have seen the train approaching. If he had stopped and looked, I guess it would give it time to run in sight, if he stopped any length of time, if he had stopped within eleven steps he could have seen a train coming from the north about 200 or 250 yards. This curve around here prevented him seeing it further, and there were timber on the opposite side that cut off his view; just woodland, woods grown up. There was a whole lot of woods there then; it is cleared off now. I don't know how many acres of it was there then. Above that crossing the land was Uncle Charlie Wade's. Yes, now there is a field

on both sides of the road. There was not then. No, there has not been a cleared field there for years. William Cooley cleared it, since this accident. He cleared about a couple of acres there. Yes, he cleared what was in the way of seeing the train coming. Those two acres were in our way. It is owing to the thickness of the timber whether a train could be seen through the forest there. It was close and crubby then. It was about 20 or 30 feet high I suppose. I never could see in through there. With those woods cut away, and standing in that space of eleven steps, you could see a train approaching from the north until it turned the other curve. I guess that is 800 yards.

Redirect examination:

I know the condition in which this little girl has been since the accident. She has been very poorly. She has not been able to do any work within two or three weeks after the accident. She can walk something like two or three steps at a time. The effect of walking throws her into misery. She is very nervous. She has not been able to do anything about house work, or any domestic duties since she has been hurt. For the first two or three weeks after the accident she got about a little. After she took to her bed and since she has been using this roller chair, she has not been able to do anything. She was carried to her father's funeral on a spring bed.

47 Recross-examination.

I disremember how long after her father's death the funeral was had. I don't remember what time it was. It was in that same year. I disremember how close it was to Christmas. Yes, Miss Inez could get about for two or three weeks after the injury, but she was in misery, or seemed to be. Yes, she said she was. She did get about some in misery, yes. She did not do much of the domestic duties, if anything. She did not help cook to amount to anything. I was there mighty near every day right along then. I saw her trying to do something, I could not say what all. I saw her try to wash dishes, make up the beds, or something like that. She just kept getting worse and took to her bed.

Yes, there was a conference of doctors about her. That was right recently after she took her bed. It was first Dr. Hathcock and Dr. Quillian, and then Dr. Ham. The lawyers were employed to bring these cases very soon after the accident. I know when the lawyers were employed, but I don't know the exact date. I reckon it was before Miss Inez took to her bed. The funeral occurred several months after the accident.

S. S. CARTER, a witness called and sworn in behalf of the plaintiff, testified as follows:

I reside in Hall County, Ga. I am acquainted with Mag Wade's crossing. It is called the Mag Wade crossing on the public road. Yes, it is a public road. It is traveled pretty publically. The railroad has a railroad crossing sign there. It has a blow post there and I have seen it. I don't know how far it is north of the cross-

ing. I examined the cross- at the request of Mr. Thompson. It looks to me as though it was about 400 yards from the crossing. Yes, there is one south of the crossing, but I don't remember it. It is a pretty bad crossing. It comes down powerful steep, right down to the railroad, and I reckon, as well as I recollect, it would be about twenty feet, right where it makes a straight down before you get to the railroad, and I think if there was any shrubbery there, you could not see anything within twenty feet of the track. No, I did not examine it at any other time.

(Plat shown witness.)

48 Yes, the dirt roads falls down towards the railroad track right here. By the time you got within twenty feet of the track you could not see the track up here on account of the hill. I reckon in that space of twenty feet from the track, looking north, your view up the track would be limited to about 175 yards. You could not see further than 175 yards, because the track curves, and there is a little cut, and you could not see over it. It is cleared there now, and you can see further. When I was there it looked to me like it was cut down recently. Before it was cut down you could not see further than 175 yards; that is right. I went there to examine it with you and Mr. Howard Thompson, and at your request. The stumps looked fresh cut then; looked to have been cut about a month. I don't think there would be over two or three acres cleared there. In my judgment, with those trees there, you could not see over 175 yards up the track. I believe you and I and Mr. Thompson went there to examine it in October of last year. The man that got killed is my cousin. No, I did not telephone, nor send word to Mr. Howard Thompson to come up there after the accident. I don't remember when he come up there. The accident happened on Sunday. I was not at the inquest, and do not remember when it was. It was some little time afterward that I was up there. No, sir; I was not there the day the inquest was held. That day we were all standing there, I think, as well as I recollect, it is 90 steps from the crossing to the top of the little hill, where we could see Wade's crossing, and see both ways, and as we were standing there, a train blew. I took out my watch and looked at it to see how long it would take after it got in sight to where the accident happened.

Objection. Sustained.

Where I was, I could hear the train if it had not whistled, for I was on the top of the little knoll to look at the train. No, I did not experiment from the public road as to whether you could hear it, or not. I have known old man King a good many years. I suppose he has been trading and doing business with me fifteen years,—I will say eleven years. He never did anything up there except farm a little. Yes, he did a little work on the farm. I don't think he had but two farms. I guess there was 200 acres in the two farms. I think he ought to be worth four or five hundred dollars a year to his family. Everything combined, I think he ought to be worth four or five hundred dollars a year to his family

49 Cross-examination:

It is a hard thing to get at what a man is worth. Yes, I am a batchelor, and am sorry to say it. I am not an expert on a husband, and father. Elimination, the question of affection for his daughter and fondness for his wife, and getting down to what he was worth in work, in dollars and cents, I don't suppose he would be worth that much, for something a man is not a good trader. He would not have to be worth much to be as good a trader as I am. I could not tell as to him being infirm and ailing for the past twenty-five years. He would come there and buy from me for himself and for his renters, and when the year was up he would pay me. I could not tell very much about him, except how he did business with me. When Mr. Arnold and Mr. Thompson was there at the crossing, it was before I was a witness at Clarkesville. I was a witness there at the September —, and it was before that I went up to see the crossing. Yes, it was in the early fall of last year. The Clarkesville Court, convened on the first Monday in September. No, I did not measure any of the distances, or the distance from the railroad tracks to the foot of this little hill; I just looked at it. No, if a witness should swear that he measured it, I would not put my judgment against his measurements. Yes, there has been clearing done there. I don't know whose land it is, but Mr. Wade's run up there. I suppose the right of way is one hundred feet wide. The clearing was to the right of the right of way; the road, all the way down to the hill, has been cut down. Some of the clearing that I thought was fresh was on the right of way, and some of it not. Clearing on the right of way is done in the summer, I think. Yes, they cut the right of way off in July and August. I did not pay much attention to the clearing; just noticed that clearing below there. As I saw it, in the condition it was just before September of last year, by standing on the crossing where Mr. King was hurt, and looking north, I could see up the railroad for half a mile; but if that had growed up I could not. Yes, I could, the way it was in September when I was there. Yes, I live at Lulu and am pretty familiar with trains. I don't know of any train that does not make a noise. They all make a noise. A train running from forty-five to sixty miles an hour, makes a muss that can be heard a considerable distance. The noise travels faster than that speed.

50 Miss Inez King, recalled by plaintiff, testified as follows:

No, sir; before this accident I had never had any interior or internal trouble; no pains in the abdomen. Since this accident I have had pains inside my body. I have a kind of pressure all the time; a kind of bearing down pains and aching. Since this accident, at the time of my monthly sickness, I have more trouble than I had before.

Cross-examination:

Before this accident I had not been treated for this trouble; these pains at my monthly periods. My mother never gave me anything for that, and I was never treated by any physician at all. At those

times, before I was hurt, I did not suffer anything at all compared with what I do now. I did not suffer but very little. I might have been a little weaker at that time, than at other times. Before I was hurt, I had not taken anything for those pains; no tea or medicine at all that I know of. Yes, I guess at some time in my life before I was hurt, I had taken some medicine. No physician ever gave me any medicine. Yes, in January, 1904, I was examined by Doctors Hathcock, Goss and Ham, and I have not been examined by Doctors Goss or Hathcock since. Doctor Ham has examined me since, I suppose, but no other doctor.

(To Mr. ARNOLD:) I wore the plaster paris jacket ten months, day and night. That was around my body and spine.

(At this point, on request of counsel for the railroad company, defendant, and without objection on the part of plaintiff's counsel, an examination of the plaintiff Inez King is to be made by some physician or physicians not interested in this case, upon the adjournment being taken for dinner.)

TAYLOR DODD, a witness called and sworn in behalf of the plaintiffs, testified as follows:

My name is Taylor Dodd, and I was one of the parties driving over the crossing the day Mr. King was killed, and his wife and daughter were hurt. I am a little relation to Mrs. King; about third cousins. No, I had not been to church that day. I had been up in Habersham County about Clarkesville. I got married that day.

51 I was driving in a buggy ahead of Mr. King, something like thirty or forty feet. I did not see or hear the train, as I passed over the crossing. I had gotten about 60 or 75 yards over the crossing before I knew of any trouble behind me. I heard the engine give two short blasts and looked back, and as I looked around I saw it hit them and knock them off. It hit the hind wheels. The engine must have been fifty feet, something like that, from the buggy when it blew. I did not hear any crossing signal, or any kind of warning, before I heard it give the two short blasts. I don't think it rung the bell. I did not hear the noise of the train up to the time it gave the two short blasts. Coming around that hill south towards the track, and something like fifty yards from the track, you can see up the railroad, but there is a space of thirty or forty yards that you cannot see the railroad until you get within a few feet of the track again. In that thirty or forty yards as you approach the track, there is a little mound there and some bushes that cuts off the view of the railroad. I never measured the distance, but I suppose it is something like twenty or thirty feet before you can see up the track again. I could not say positively how far I could see up the track then. Yes, the track curves all the way up. It is a reverse curve, you might say, to the right. It curves out of sight in fifty, or may be one hundred yards. There are no trees on the right hand side looking north now; there was then. I do not know that those trees would have any effect on the view of the train as it swept around that curve, I really don't know whether you could have seen the train at that time or not. It is now cleared to the right of way one hun-

dred yards or more. Well, the picture you show me is a fairly good representation of the situation back towards the way Mr. King was coming down to that crossing. The buggy circled around that group of trees. All this over here is now cleared, but it was then saplings and trees. Yes, the other picture represents the country where they have a borrow pit. Yes, the man taken in this picture sorter favors Mr. Howard Thompson.

(The first picture exhibited witness was No. 7 and the second one No. 4.)

The cut there is twice as high as Mr. Thompson's head. Picture fairly represents that crossing with a man standing on it, but it looks to me as if this side over here is about level. Outside of that it represents it very well. Coming down to the track, that clump of trees were to the left of the track. Coming around this hill down to the crossing, Mr. King would *have* have any view of the track
52 at all from the top of the hill; and not until he got to within twenty or thirty feet of the track. When he got to the crossing he could have seen up the track a hundred yards, I guess. Picture No. 5 fairly represents the way the dirt road goes over the crossing. This picture looks like a representation of the road before you get to the crossing. Yes, you could get a glimpse of the track back here. That train must have been going forty or fifty miles an hour. I could not tell that it checked up for the crossing. The engine went something like 200 yards beyond the crossing before it stopped. No, of course I did not measure the distance. Yes, the back coach cleared the crossing before it stopped, a car length or so. I did not count the coaches in the train, but I think there were five or six. When I got to him the old man was living. I stayed about twenty or twenty-five minutes, and left him living. I saw the little girl thrown up higher than you could reach. Yes, I mean in the air. She must have been thrown up in the air twelve or fourteen feet. I cannot say positively how she struck the ground. She struck nothing but the ground, that I know of. I have been at her house a time or so since the accident. I found her then in about the condition you see her now. Before the accident I never was about her much, but I guess she was always reasonably stout.

Cross-examination:

At the time the accident happened, I had passed the crossing about fifty or seventy-five yards. I was ahead of Mr. King something like 50 or 60 or 75 yards, along there; I never measured it. Will Dodd was between my buggy and King's buggy, in a wagon. Yes, my buggy had crossed, and Will Dodd's wagon had crossed, and then came Mr. King. I was driving tolerably peart, along in a trot. I reckon I left them behind a little. I passed them on the top of the hill, around on the other side of the railroad, and they started out in a trot after my buggy. Yes, from my buggy to King's buggy being about 75 yards, it was about as close as we could comfortably drive. They were trotting to keep up with me, I expect. No, I did not hear the engine whistle until I heard those short blasts. No, I was not listening. Yes, it might have whistled, but I did not notice it,

though. I was not conscious of hearing it. All I say is I did not hear it. I was living in Banks County at that time, five miles from the railroad. At that time I had never lived nearer the railroad than five miles. In coming in the direction Mr. King was
53 traveling, for some time he was traveling in a southerly direction, with the railroad to his left. He went on the top of the hill, then down the little hill to a flat, and then along the flat to the railroad crossing. Yes, on the top of the hill there was a place for a certain distance that he could not have seen the track if he had looked. The distance the track would be concealed from his view would be something like 40 or 50 yards, I guess. The 40 or 50 yards ends about twenty or thirty feet from the railroad track. In other words, after he got within twenty or thirty feet of the track, he could see up the railroad a piece. Yes, you could see it anywhere on that 20 or 30 feet by looking. On looking up the center of the track north, I would say he could see a hundred yards up the track. It curves all the way there. I have passed up there several times and know it is curved. Standing at the point you indicate on this plat, at the center of the track, the curve of the road hinders you from seeing up the track seven or eight hundred yards, and there is a bank or a cut about there. No, sir; I don't know the height of an engine, and don't know the height of the little bank I was speaking of. The crossing where Mr. King was hurt is where the man is standing on the track in this picture. Yes, if a man was standing on that crossing as it appears now, then he could see over any obstruction that was in the way, and see up the track. Yes, the road curves the other way after you get by Wade's house; it makes another curve. I don't know the distance Mr. Thompson is standing in this picture about the crossing, but something like forty yards, I suppose. Yes, he is standing on the west side, the way Mr. King was going, looking at the crossing. Between him and the railroad track is the barrow pit. That borrow pit is about fifty feet broad. No, there is nothing in that borrow pit to prevent a man from seeing. It has had dirt taken out there, and reduced the ground almost even with the top of the rail. There is a bank between the barrow pit and the crossing. Within that twenty feet from the railroad you can see up the track, and that borrow pit aids you in seeing; yes. I have known Mr. King ever since I was a chuck of a boy. He was able to work and did work. I guess he made a pretty fair hand. I have seen him at work knocking around. I lived four or five miles from him. Yes, he made a crop, but I cannot say how much land he cultivated. He rented some of his land and worked some. He had two places. I reckon portions of them joined. Yes, the two parts joined at one place, if I am not mistaken. I saw Miss Inez King at her home about a year ago, and she was in about the fix she is in now.
54 I was over there some time last summer, and then I was there last Sunday. Since she was hurt I have seen her two times, and she was in about the same condition as she is now.

Dr. E. P. HAM, a witness called and sworn in behalf of the plaintiffs, testified as follows:

I am a practicing physician and have been practicing about eigh-

teen years. I practice at Gainesville. I have treated Miss Inez King, the plaintiff. I first saw her about six months after she was hurt. I then found her in a right nervous condition, and a little anemic. She has since then remained in practically the same condition. I see no difference now, than then. I put her in a plaster cast, and kept her in it for ten months. The case was put over her spinal column, to relieve the weight principally. This condition by medical men is called neuresthenia. The whole body is affected by this neurosthenic disturbance. She is not able to walk very far. If she attempts to walk, she gives out. She apparently cannot stand very long at a time on her feet. Violence or traumatism will produce these conditions. I should say yes, to the question, "whether or not a fall, or rather a blow from a train on the hind wheels of a buggy which threw her up in the air anywhere from ten to twelve feet, and caused her to fall on her back on the ground, could produce such shock and injury as could result in that condition." To the hypothetical question, "Suppose this young girl at the time of the injury was fifteen years old, and suppose she had been in average health up to that time, milked, did work about the house, did work about the farm; made up the beds and cooked and was as active as a girl of that age usually is; and suppose she is riding in a buggy and that buggy is stricken by a train, and she is knocked out as I stated a moment ago, and falls upon her back, is carried home and develops pains up and down the spinal column; develops pain in the side; and suppose for two or three or four weeks she drags around and undertakes to do the best she can, does some little things, but the pains are increasing all the time, and nervousness is increasing all the time, and at the end of four weeks she gets to where she cannot go, and has to take to her bed, and after that has to take to that roller chair to move around, and she cannot walk without having a nervous breakdown, and cannot stand without the same thing; and suppose she suffers continuously up to now, with pains in her back and head and at periods of menstruation is far worse than before, state whether such a condition as I have described, and as you find her in, might result from that accident?" I would say I think so, yes. Taking the history of such a case as you put, I could not attribute it to anything else. Yes, I have made a digital examination of her up and down the spinal column, and found a tenderness, which indicates an irr-ation of the spine. The spine supplies the whole body with its nerves, nearly. The nerves come down the spinal cord. This inflam-atory trouble has a reflex action upon the brain. I don't know what it would result in,—it might result in most anything, nearly. I heard the young lady testify about the bearing down pains she had. To your hypothetical question, as follows, "Suppose she had never had any womb trouble before, and was only fifteen years old, unmarried, and never had any children or anything to enlarge the womb to make it heavy, and suppose after this accident, she had bearing down pains, and had also greater irregularities at her monthly period than before, what would that indicate?" "I would answer, it would indicate that the accident caused it." There is some displacement of her womb. A great many children have womb trouble. The birth of a child is

a great strain, and liable to result in injury, and even, if there is no injury, it makes the womb heavy. In a young girl the womb is small, and is not as liable to injury as in an older person. In other words I would not look for a prolapsed womb in a girl fifteen years old, as I would in an old woman. A fall can produce a prolapsed womb. If she had never had any trouble of that kind before this accident, and afterward her present condition developed, I would naturally think the injury produced it. This abnormal condition of the womb may have nearly any kind of effect on the nervous system of a woman. I have never seen anything about this girl on any of my visits that would lead me to believe she was fei-ning. I think these conditions as stated by the young lady really existed. Her condition, consequent upon an injury, is well known and recognized by the medical profession. Yet it is a fact that she might still be up and about for three or four weeks, and then get down as a result of an injury of the kind you relate. I do not think she is in a physical condition to do any work of any sort now. Her appearance is not that of a healthy person. Taking the history of her case, the injuries occurring on the 14th of October, in my opinion there is apparently no abatement of her troubles, and, if it keeps on
56 it will continue for ever. She is apparently the same as when I first saw her, and there is no change for the better that I can see. Conditions of this sort frequently last for a life time. You might put a plaster cast on her. I had one on her for ten months. You might relieve her nervousness some by medicines, but, that is just temporary. If you could get her to stand up, there is still no opportunity to give her exercise. As to the examination of the doctors a few moments ago, we found her practically the same as when I first examined her; I see no difference, unless perhaps a little more nervous. Yes, I have seen her when she had these nervous spells upon her, and at those times she jerks all over, and is apparently very nervous. Excitement apparently produces that condition upon her. In a case of this sort, there is no way to diagnose it, except to take the history of the case.

Cross-examination:

Yes, by that I mean in a case of this character, a doctor cannot tell whether the patient is suffering with the symptoms they claim absolutely. They must rely a great deal upon what the patient says about it. I have forgotten the date when I first saw Miss King, but I believe it was in January, 1904. That was in company with Doctors Hathcock and Goss. *Me*, Howard Thompson went with me. He employed me to go and see her. At that time she was being treated by Dr. Hathcock. No one has been paying my bills. I have not sent any bill to Mrs. King. I am looking to Mr. Thompson for the payment of my bill. At the time we were all there, we made an examination of her together, and we agreed as to what the symptoms were then. She then had some displacement, and anteflection of the womb; a bending forward, I think that is what it was. I think that is all we then saw. That I think was agreed to be all the trouble we could then discover. Yes, we agreed upon a course of

treatment. At that time I could not tell whether the womb trouble was of recent origin or of long standing. Yes, it is a fact that we find a great many girls of her age who have these troubles found in her, who have never had a railroad accident. Yes, I think they are quite common; common to girls who have never married, and who have never given birth to a child. Yes, it might be due to jumping, horseback riding and things of that sort, or they might have been born that way. Yes, when we examined her, she was anemic, and the only local trouble we could see was the womb trouble. Oh, yes, the same spinal trouble was there, the tenderness was there.

57 Yes, I found the spinal trouble then. Yes, we agreed upon a spinal trouble; a spinal irritation; a tenderness along the spine. Yes we agreed on a treatment for it. I don't know now what treatment, but I think we gave her some nervines, some bromides perhaps. I think we all prescribed it. I don't know whether I got the medicine in Gainesville or not, but I think I did perhaps. I next went there some little time after that. I think it was longer than a month or two months. I went the next time at Mr. Thompson's instance. I don't remember whether I put the plaster cast on that time or not. I don't remember how many trips I made, but I have seen her four or five times in that period. One time I put a plaster jacket on her, yes. I don't remember when that was or what season of the year it was. Dr. Quillian was with me I believe when that was put on. Neither Dr. Hathcock or Dr. Goss was there. I don't know whether she was Dr. Hathcock's patient or not. I think she was the first time I went. At the time I put on the plaster jacket, I don't think Dr. Hathcock was notified. In putting it on we suspended her to the ceiling. The nail broke, but she did not fall; just dropped a little, but it did not amount to a row of pins. Her feet were on the floor, but we pulled her up to relieve the pressure on the spine. When the nail broke, some one was holding her. No, it is not true that she fell, and some one caught her, for we never got her off the floor. It was a nail that broke. We had a little trapeze thing, a little harness, and the nail was rusty. Yes, it was her weight that broke it, but there was not fifteen pounds pull on it, I don't think. We put on the plaster jacket and it was on for eight or ten months; something like that. She said when she was wearing it, that it did her some good. I have done nothing for her since the jacket come off, except give her these little nervines. When a person gets a lick that is going to disturb the spinal cord, it might develop in several days afterwards. You would not necessarily see symptoms of it at the time the shock was sustained. There might be some blood vessels ruptured, and it might take several days to develop; depending on the injury. To put her in the condition she claims to be in, would not necessarily take a lesion of the spinal cord, but an irritation of the cord. Yes, concussion would produce it. In this case, I would say irritation caused the condition. Concussion is not necessarily produced by lesion; it might be a hemorrhage. I don't know what produced this hem*m*orrhage. If it was concussion, I think you would see the symptoms at once. If it was hem*m*orrhage it might be several days before you would see the symptoms.

58 If it showed up in several days, I suppose the first symptoms would be irritation about the spine; numbness; difficulty of motion and sensation. I don't see why any trouble to the spine should be either progressive, or it gets well. You can have an injury to any joint in the body, and it might be a permanent affair. If a person has an injury and is up a week, and then it develops, I mean to say it might go on and reach a certain stage, and then stop. That must be her position in this case. I think we three doctors did discover this neuresthenic condition at the time we examined her in January; she was quite nervous then. Yes, that was some four months after the accident. Yes, that was sufficient time for it to develop. I don't think she was nervous enough for me to pronounce her case needing a jacket, but we spoke of putting it on then. Yes, I think I spoke of it then. A nervous person might remain continuously in the house whether she had any spinal trouble or not; and I don't see how she could get well on a roller chair, or in a bed. I think that sort of a life would leave her limp and weak. The effect would be, if she attempted to stand or walk, that she would become nervous from it. And that would be true, whether she had any spinal trouble or not. I should think it would be true, that the nervousness I find in her now would be natural, if she had been in the house for two or three years, and had to come to the court house and be examined by a lot of physicians. Yes, at the time I made that first examination, I made a digital examination. That would be very exciting to any modest young girl, yes; and would produce nervousness independently of anything else. Putting the plaster jacket on her should not have made her nervous. No, sir; stringing her up there, and putting that thing on would not make her nervous. I put it on over a gauze undervest. Why, getting to her next to a gauze vest should not make a modest girl nervous. That is my experience; it ought not to make her nervous.

Redirect examination.

By Mr. ARNOLD:

Yes, I believe we went to put the jacket on and found her so nervous that we could not do it, and had to come back again. I don't think we put the plaster jacket on her the first time I went there; I don't think she was in a condition to have it done.

59 No, a person having the spinal trouble she had, and feeling as she does, cannot get around very well. She has no other alternative than to use the chair in moving around. When the spine is in the condition hers is, she must keep quiet. Dosing her with medicine has not done her any good. I think the plaster jacket was the best thing I could do for her, to support the spine and let it gain strength. If it was going to recuperate and get strong, it should do it in that ten months. A lesion is usually a broken place; some abrasion, or something of that sort. The full effect of an injury is not felt right at the time, but starts to work inflam-atory processes, and does not reach its ultimate result at once. Yes, frequently you may be looking at a man, and the next minute he may drop dead, and you could not tell there was anything the matter with

him. Yes, it is true that a blood vessel may burst and keep seiping out until it reaches a broad enough area to produce death. There are prominent conditions of physical injury which do not manifest themselves to the eye, and yet the injury is just *a* [as] palpable, as if we could see it. The business of the doctor- is to treat those cases the best they can.

Recross-examination.

By Mr. STRICKLAND:

Yes, there is a character of nervous trouble known by doctors as "railway spine." A railway spine is one of those cases that develops an inability to walk and an inability to get about; extreme nervousness. I don't know about these cases being frequently brought on by the necessity of a railroad case. I don't know about the necessity of a case *for* an injury will have the effect of frequently keeping a person from recovering. Within my knowledge of medicine there is nothing that can be done, or no treatment that can be resorted to to relieve her.

TAYLOR DODD, recalled by plaintiff, testified as follows:

By Mr. ARNOLD:

Yes, I have examined this plat tacked up there. It does not show the curve in the railroad track as it looks to me. The curve looks *to* [too] straight to me. The curve in this other plat comes nearer presenting the curve to me.

60 Cross-examination.

By Mr. STRICKLAND:

No, I am neither an engineer nor a surveyor. No, I cannot state that these two plats are on the same or a different scale. No, if you take a curve drawn on a scale of twenty feet to an inch, and one drawn ten feet to the inch, they would not look alike. I think the curve drawn twenty feet to the inch stretches it out and makes it look straighter. I suppose the engine of this train went beyond the crossing about 250 yards before it stopped. I think the last car in the train went about a car length over the crossing. On the other trial of this case, I think I said the last car went a car length or two beyond the crossing.

C. D. CAGLE, a witness called and sworn in behalf of the plaintiff, testified as follows:

By Mr. ARNOLD:

Yes, I have been sworn. Yes, I know the Mag Wade crossing involved in this case. I have been along there a right smart, before Mr. King was killed. A person approaching the railroad track on the dirt road from the north, after he gets over the top

of the hill don't have much of a view of the track north, until he gets to the crossing. When you get where you can see up the track, I suppose you can see up the track fifty or sixty yards; something like that. You must get — ten or twelve feet of the crossing before you can see up the track. When you get in that space of ten or twelve feet, I suppose you can see betwixt two and three telegraph poles. The distance between telegraph poles is about seventy yards. Yes, I suppose you can see then something like 140 or 200 yards. The track makes a curve which prevents you seeing further. Then behind that curve there is an embankment; and there are some trees on the left hand side of the track as you come down. In the picture you hand me, it seems to me this has been cleared off here. That is the way it is now. Before it was cleared off, the trees were along here, in this picture No. 5. It seems to me they come closer to the railroad track, than shown in this picture. With the trees and the cut there, you could not see more than fifty yards, or something like that up the curve. Yes, those trees have been cleared away. I have been to King's house severel times since the accident. I could
61 not say how many times but lots of times. Yes, I have seen this little girl when I have been there. When I was there she was on the bed, or in the roller chair. Her appearance is somewhat better now, than it was then. I saw her just after the accident.

Cross-examination.

By Mr. STRICKLAND:

I live at Lulu. I run a livery stable and a farm. I could not tell you how I came to be a witness here about that Mag Wade crossing. I drove Mr. Thompson up there when Mr. King was killed, and with Dr. Oslin that day after he was killed It was Dr. Oslin, of Gainesville. He used to be a railroad surgeon. I don't know as he was then. We first went to King's, and then up to the crossing where they held the inquest. No, Mr. King had not been then buried. Well, I don't know what Thompson was doing up there; suppose he went there as an attorney. Yes, I carried up the doctor and the lawyer before the old man was buried. I think it was Thompson hired me to go, or Sandy Carter, one or the other. We went from the house to the inquest, which was held. I was driving all the time I was there. The only connection I had was driving the team. Yes, I stated I thought it was about ten feet from the railroad track to where you could see up the track at all. Yes, I stated there was a place back of that ten feet where you could not see the train; that was a space of some forty, fifty or sixty yards; something like that. After you got close to the track you could see the train. After you got — ten or fifteen feet of the track, you could see the train. After you got within the space of ten or fifteen feet of the track, there is something that would obstruct the vision of a train, a half mile up the track. I do think the woods would obstruct the vision on either side. No, sir; the line of vision is not entirely within the right of way for nine or ten hundred yards, but goes outside of it. The line of vision would go through some woods, or strike some apple trees, or something of that kind. Well, I suppose

it would strike woods, not apple trees, for as I understand it, the railroad is sizzag or wobbling; I mean it curves both ways. The first curve is to the east, and the next curve to the left or the west. I don't think the place where the curve changes from one to the other, is half a mile from Mag Wade's crossing. Yes, it is above old man Charles Wade's house. No, I don't think it is true that you could stand at this crossing and see a train going on this rail-
62 road, north of old man Wade's house. It seems like I have tried it. I think it curves too much, and you will remember there are some bushes coming on the right hand side. I don't think you could see it to Wade's house. I think you might see a train fifty or seventy-five yards this side of Wade's house. I don't think Wade's house is half a mile from the crossing. The bushes and trees I spoke about as preventing the view of the train is on the right hand side of the track. There are some on the left hand side, but they would not interfere with the vision. The trees I referred to is off the right of way, right in the bend of the curve. The right of way is I suppose fifty feet from the centre of the track. These trees were common sized saplings. I suppose about as big as my thigh. They were pretty thick, but I could not tell you how tall. I don't know how large an area they would cover. I guess I have been there a hundred times, I never measured the distances; no, I am just guessing at them.

Redirect examination:

Yes, I heard Mr. Carter saying something about Thompson being up on 12 to attend the inquest. Mr. Carter saw Mr. Thompson after he got there. Mr. Thompson was at the inquest and was present when the witnesses were examined. Mr. Carter is a cousin of the dead man, King.

By Mr. STRICKLAND:

Ed. Quillian was there for one, examining the witnesses. The coroner it seems did most of the examining, but some lawyers asked some questions. I cannot think of the name of the coronor. I think Mr. Thompson asked a few questions. Quillian asked some questions, and he was the railroad lawyer, or I understood he was. I don't know when he became a railroad lawyer. This happened in 1903. I never saw him in a railroad case, but I understood he was the railroad's lawyer. He came with the railroad crew.

M. A. TERRELL, a witness called and sworn in behalf of the plaintiff, testified as follows:

By Mr. ARNOLD:

I was not right *right* present at the place where Mr. King was killed, but was about 300 yards off. I did not see the killing. I did not see the train as it passed over the crossing,
63 but saw it after it had crossed it. I saw where it stopped, I suppose the engine stopped about 300 yards from the crossing; it passed me a little bit before it stopped, but I don't know how far.

I did not hear the engine blow. I did not hear any signal given for that crossing at all. I don't know how fast the engine was running.

Cross-examination.

By Mr. STRICKLAND:

I was in the wagon road. I was south of the crossing, and while I cannot be positive, I suppose I was about 300 yards from the crossing. I was ahead of Mr. Dodd and Mr. Yarbrough, who were travelling that road. I was walking. I saw Taylor Dodd down the road. I don't know how far ahead I was when the train passed. I did not pay any attention to the rear end of train, and don't know where it stopped. I don't know how many coaches were on that train.

W. S. WRIGHT, a witness called and sworn in behalf of the plaintiff, testified as follows:

I recollect the day Mr. King was killed. I lived near there. The engine went somewhere 750 feet below the crossing and stopped. I saw it when it stopped. I did not hear the engine blow for that crossing. I have stood on that crossing and looked to see how far north I could see up the track. Standing right in the middle of the track, you can see up about 180 yards. I never measured it, but counted the rails. The curve in the road then cuts off the view. The track curves around to the right. On the right hand side of the road it was in woodland, at that time. It has been cleared off since. I think Mr. Colley cleared it. I lived I suppose about a quarter — from the crossing. I have been in the house of these people since the accident. I have seen this little girl. When I have been there sometimes she was in bed and sometimes in the chair she is now. I cannot tell you how many times I have been there since the accident, but several times. I never kept count of the times.

64 Cross-examination.

By Mr. STRICKLAND:

At the time of the accident, I was at home. I live on what we term the south side of the railroad, or the southeast side. I live on the same side as the wagon road runs. The wagon road runs between my house and the railroad. I live about a quarter — from the crossing. I was sitting on the porch when the train passed. I did not hear the engine blow the crossing signal. Of course, the train may have blown for that crossing many times, and I not notice it. My mind was not directed to the train at all. No, there is no reason why I should have noticed it at that time. My attention was attracted to the train by the two short blasts; the unusual blowing attracted my attention to it. No, sir; you cannot see the train when it blew, from where I was sitting. I went down there, but it was some little time afterwards. I found out what was the matter before I went. I did not go for more than fifteen or twenty [minutes] after, but I could not say how long. When I went, I went to where Mr. King and Mrs. King and the little girl

were. Yes, the engine went about 750 feet beyond the crossing and stopped. I don't know where the rear end of the train stopped, for I paid no attention to it. My house sitting in the condition as it is, and the railroad inclined to make a curve and where I was sitting, the engine come in sight, and rolled down and stopped. I counted the rails. A rail is thirty feet or was at that time. There is a space coming from the west before you get to the track, that you can see up the road. Yes, that is coming from the direction Mr. King was coming. Of course, the farther you get from the railroad, you cannot see, and then there is a cut there that prevents you seeing. I think the space where you can see up the track is about eleven steps long. Yes, that would be about thirty-six feet. Yes, the road curves to the right as you look towards the north. The further you get away from the track the further you can see up the track, that is, until you get where the view is cut off. Standing within the space of twelve steps, and at the expiration of the twelve steps, I did not examine to see how far up the track I could see. I could not swear as to that. Yes, there is a point where the track gets out of the line of vision, in consequence of that curve. After that time, I went there and examined to see how far you could see an approaching train, and you could see the train approaching above there twenty steps. I believe it was twenty steps from the railroad track you can see the train approaching. I don't know that you could see it for half a mile, for I never measured it, but I suppose it was something like that. I suppose if I had looked, I could see a train there for half a mile, although, I never measured it. Standing on the track at that crossing you could see the track for 180 yards, but I don't know how far you could see a train. Of course, a man could see a train when he could not see the track, but I don't know how far up he could see the train, for I think the woods would cut his view of the train off. I don't know whether, standing on the track there, you could see a train a quarter or a half of a mile off, regardless of the woods, for I never examined that. The woods were cut down not so powerful long after that, and I never looked to see the exact distance. The woods belonged to Mr. Charley Wade. There was a good big territory of woods there then. From this crossing to the field where it was cleared, I would guess it to be 150 or 200 yards; that's mere guess work. The land beyond this *place* of woods I am speaking about, was cleared land and in cultivation. That strip was still east, off the right of way. The woods was reasonably thick. I could not say whether you could see through the woods or not. I don't remember. Why, of course, sound would go through there. (Picture is handed witness). Yes, I see a building up there. The first house in the line of vision, I suppose would be Mr. Mag Wade's. Mr. Charley Wade is the nearest man, and he is nearly at the railroad, but not just on it. No, he is not on the right of way. I don't know that there is another house near the right of way, which would be in view of the instrument that took this picture. It must be old man Wade's house, unless it [is] his son's just a few steps from it. I don't think his son's house is under the hill from the instrument. I am under the impression that it is old man Wade's house, from the fact that this must be the

old shop house there. I could not tell you if the timber would be in the line of vision of a man coming to the crossing, as far as old man Wade's. If I was standing on the west side of the crossing, anywhere within the ten or twelve feet and looking up north, there is no timber now to cut off the view. So far as the timber is concerned, of course, it would not interfere with the view as far as old man Wade's, because you are looking up the cleared and trimmed right of way. This timber in the picture seems to be standing above old man Wade's house. Taking the picture and looking towards the north, as the picture appears, I see some timber, but I could
66 not say from the looks of the picture whether it is below or above Mr. Wade's house. Yes, the instrument has got to stand south of the crossing, to take this picture. I could not say whether that timber could be taken beyond Mr. Wade's house or not. The timber I was speaking of was near the dirt road. Of course, of this is the timber coming to the right of way, it is the timber I am talking about, of course. Standing ten or twelve or twenty feet from the railroad track at that crossing, I don't know that that timber is in the way of seeing to old man Wade's house; I suppose you could see something near that far, but I never examined that, and, therefore, cannot answer that question positively.

Miss BONNY DONAHOO, a witness called and sworn in behalf of the plaintiff, testified as follows:

By Mr. ARNOLD:

I know this young lady here, (plaintiff). She is my aunt. I remember when she got hurt in October, 1903. I was down in South Georgia, at that time. I got here on Wednesday, after the accident. The accident was on Sunday, and I got here on Sunday. I saw her at her home, at that time. She was not in bed when I first went there. She was in bed a part of the time, and sitting up a part of the time. Yes, I was about the house for quite a while; I suppose for two weeks or something like that. I helped about the domestic work of the house. I helped milk the cows, helped cook, make up the beds and wash the dishes, nurse the baby, go down to the spring for water. After the two weeks I stayed there, I then went home. I came back there again in April, and then I stayed there seven months, and did the same sort of work I did before, all the time I was there. This plaintiff was perfectly helpless almost, the seven months I was there. She was in that chair, yes. She did not do anything while I was there. She was in that chair, or in bed all the time. I am sixteen years of age. I am pretty near as old as my aunt. She is thirteen months older than I am.

Cross-examination.

By Mr. STRICKLAND:

I arrived at her house on Wednesday after the accident, and when I went in she was sitting in the room. I stayed

there then something like two weeks. During that
67 two weeks, Miss Inez was in bed part of the time, and part of the time up. She did not do anything while I was there. No, she did not help cook, make up the beds, clean up the house, milk the cows, didn't go to the spring, nor nurse the child, she didn't do anything. She was in bed most of the time. That was the first two weeks after she was hurt.

Redirect examination.

By Mr. ARNOLD:

No, I don't know what she did the first two or three days after she was hurt.

Mr. ARNOLD: I now offer in evidence a certified copy of a record from Habersham Superior Court. I wish to offer the indictment and conviction of engineer Dewberry, for a misdemeanor, in failing to blow, check and keep checking, when approaching a public road crossing, under the statute.

Mr. STRICKLAND: I object to that, on the ground that the case is now in the Supreme Court, and possibly any such conviction will not stand.

The COURT: The objection is sustained.

Counsel for plaintiff now reads in evidence the depositions of the following named persons, to-wit, Mrs. Taylor Dodd, Frank Yarbrough, Mrs. Frank Yarbrough and Mrs. Harriett Masters. To the reading of the last named deposition, the defendant objects on the ground that the witness was not sworn, and it is not evidence; that the administering of the oath was not waived. The ruling upon this objection is reversed for the present. The objection was afterward withdrawn.

Counsel for plaintiff offers in evidence the six pnotographs heretofore identified and used in the trial. These are admitted without objection.

Counsel for plaintiff next offers in evidence the Carlisle and Mortality Tables found in the 70th Ga. report. These are admitted without objection.

Here the plaintiffs rest their cases.

68 The following agreement as to what H. N. Maston, if present would swear, was read to the jury:

"H. N. MASTON will swear that he went to King's residence about three or four weeks after the accident and saw Miss Inez King walking about the premises carrying a baby in her arms. He saw her coming from the spring with a tin bucket in her hands."

C. W. HUGHES, a witness in behalf of the defendant, being duly sworn, testified as follows:

By Mr. STRICKLAND:

I have no connection with the Southern Railway Company, but had at one time, being a civil engineer, Charlotte Division. As such civil engineer, I made this map. This map

represents the alignment of the main line of the Southern Road at mile post 576, and also the approximate alignment of the public road along the line there. This includes the crossing, which is right at this end of the map. This shows the proper curves of the railroad at this point. Yes, the dirt road is approximate. The railroad is accurate the curve being taken by a transit. This Map No. 2, which you show me, represents the same conditions as the other one, except that it goes a good deal farther. That one simply represents Mag Wade's crossing and the first crossing north of that. This one takes in more territory than the other one. The curve on both maps is the same, but on the map it looks quite different, because the scale on one side if fifty to the inch and on the other is two hundred feet to the inch, which makes the curve here look sharper than on the other. I don't remember the date on which I made the survey, but the date is on the map, right down at the title, "August 25th, 1904." At this crossing the dirt road coming from the west is level, nearly for about sixty or sixty-two feet. It is level to the foot of the hill, which is about 60 or 62 feet. Yes, that is on what we could call the west side. Standing on the dirt road near the track, and within that 60 feet you could see up the railroad track, north, for a considerable distance; I should think at least a thousand feet, and perhaps 1800 feet or more. At the point where you are not able to see the track further, you are prevented, because the road runs around behind a little hill, and that little hill obstructs the view. Yes, you could see a train on that track further than that. As well as I remember, you could see a
69 train on the track as far as the other crossing, up perhaps a half a mile. I saw a train coming the day we were there. It was approaching, and I saw it coming for a considerable distance up the track, and as well as I remember I saw it just after it blew the signal for the other crossing, about a half mile north of this crossing. I was then standing about thirty feet from the track, in the dirt road and on the west side of the track. Yes, on the side Mr. King was coming when he was hurt. We were going to take the train for Atlanta, and we were all prepared to board it, and I was standing some little distance from the track. Yes, I heard the train coming very distinctly; the rattling of the train. I heard it when the crossing signal was blown, which attracted my attention, and then I heard it coming for several minutes. As to the distance, I should say two miles. I did not notice any point where I could not hear it, from that time until it reached Mag Wade crossing. Standing on the dirt road west from the railroad track and near the foot of the hill here, there was nothing to obstruct the line of vision looking at a train coming on the railroad from a northerly direction, except some sedge brush. There was some scattering bushes there, but nothing of any consequence. No, I do not think the line of vision would go beyond the right of way, standing at the foot of the hill on the west side of the track, looking north. I could not tell that, without applying a straight edge. (Applies a straight edge and says), at the far crossing there, it would just about hit the right of way, that is a half a mile back, but at eight hundred or a thousand feet, the line of vision would stay entirely in the right of way. I mean by that, standing

at a point at the foot of the hill and looking eight hundred or a thousand feet north, my line of vision would be entirely in the right of way; and looking for half a mile, it would just touch the edge of the right of way on that side. There is nothing to prevent you from seeing a train on that track a thousand feet away. Putting myself, say ten or fifteen feet from the track and looking north, then my line of vision would leave the right of way 1635 feet north of the crossing. I could not see the track that far, because on either side of the track near that crossing, there is a little cut. Yes, it would curve out of my sight. But a train would rise considerably above the cut, and you could see it.

No cross-examination.

70 BEN. F. DEWBERRY, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

My name is B. F. Dewberry. I am an engineer on the Southern Railway, and was on the 11th of October, 1904. I remember the time Mr. King, and Mrs. King and Miss Inez King were in a buggy and injured at Mag Wade's crossing, in Habersham County. I think that was about the 11th of October, 1903. The train was No. 39, and I was the engineer pulling it. I was right on schedule time. I suppose we were running between thirty and thirty-five miles an hour. Our schedule gait was thirteen minutes to run that seven miles from Alto down to Lulu. Yes, I blowed the crossing signals. There is a crossing north of Mag Wade's crossing, almost in sight of it. I could see it from Mag Wade's crossing. I did blow for that crossing and also for Mag Wade's crossing. I saw Mr. King, Mrs. King and Miss King that day before they were hurt. After I blew the regular crossing signal, I discovered a mule's head coming down the hill towards the railroad crossing, from behind a clump of bushes. By that time I was at the mile post, just about seventy-five or one hundred yards north of Mag Wade's crossing. As soon as I discovered that mule's head coming from behind that clump of bushes, I reached up and blew another road crossing whistle and all three of them turned and looked me right in the face, and I saw the old gentleman commence jerking up the mule to get across ahead of me. Of course, I jammed the brakes on as tight as I could get them to avoid an accident. At the time they turned and looked up at me, the mule had not yet got on the crossing. Yes, they were then safe, if they had stopped. Yes, the old gentleman undertook to hurry the mule on. Just as soon as I saw he was going to try to cross ahead of me, or making an effort to cross ahead of me, as the fellow said, "I swiped the air." The air was working right, and I did everything possible to stop. I struck the rear wheels of the buggy, with the pilot of the engine. I don't know just exactly how far beyond the crossing I went, but I think the train stopped in two or three car lengths south of the crossing. I had only three cars in the train that day. Yes, I meant the rear of the train stopped that far from the crossing. There are between ninety and one hundred

crossings on the Southern Railway, between the South Carolina line and Atlanta.

71 Mr. ARNOLD: I object to that question and the answer, because incompetent, immaterial and inadmissible. I think the entire case should be confined to this crossing.

Mrs. [Mr.] STRICKLAND: I expect to prove that between the South Carolina line and Atlanta there are practically one hundred road crossings, or between eighty-five and one hundred public road crossings; that the distance is one hundred and one miles; that the crossings in some localities are very close together and within a few hundred yards of each other, and at others farther apart, but on the average making about a crossing to the mile almost. We expect to show further, that to observe the statute and check and keep checking so as to have the train under control, and to stop should any person or thing be on the crossing, it would consume from five to ten minutes for each crossing, dependent, of course, on the weight and length of the train and the grade; but it would make an average of seven or eight minutes. We wish to show that this train was made up and known as No. 39, the vestibule train which runs from the City of Washington, through the States of Virginia, North Carolina, South Carolina and Georgia; that it was carrying passengers from one state to another, and also carrying an express car with freight on it from one state to another. We wish and expect to show that obedience to that Crossing Act would hinder, and practically prevent interstate business being done by the defendant railroad. We wish to show the conditions I have just stated all existed at the time this accident occurred, on the 11th of October, 1903.

By the COURT: The testimony will be excluded, and you may have an exception noted to this ruling.

Cross-examination.

By Mr. ARNOLD:

The blow post is four hundred yards from this crossing. The next crossing north of Mag Wade's crossing is, I don't know exactly, but I suppose it is seventy-five or one hundred yards north of the blow post. Yes, I suppose it is about a quarter of a mile north of this crossing. Yes, on a blow post we have two long stripes and two thin ones, which indicates two long blasts and two
72 short ones. No, sir; we are not required to blow a continuous blast from the post to the crossing. We never do that, and I did not undertake to do that there. Yes, I blew two long and two short blasts, but I hardly blew them in four or five seconds. The train would travel over fifty feet during the time I was blowing. I generally pull the whistle that way, (indicating). Yes, I could blow it in the time I moved my hand. Yes, I expect five or six seconds would cover the time. The distance I would run in that time would depend upon the speed of the train. Yes, we had a light train that day; three coaches. We usually have five or six coaches on that train. No, I did not have one of the largest engines. Yes, it had six drivers. The grade there is what we call a broken grade; a dip, and a little

rise. It begins to rise about seventy-five yards from the crossing. Before we got to that rise, we were going down grade. Yes, a grade is an obstacle to speed as well as a curve. A curve that is not level will stop a car that is rolling, if it has curve enough, if the car is not moving too fast. The curve takes away the momentum of the car from a straight line, and tends to obstruct the train, as well as a grade. I think the bottom of this dip is about middle ways from the rise on each side of it. No, I don't suppose it was two hundred yards down grade. Yes, with heavy trains, engineers take advantage of a down grade. No, it is not altogether necessary to take a good start to make the hill, with a light train. Not [No], it is not the usual rule. The usual rule is to pull the train as steadily as possible. Yes, I could have made any speed I wanted to with that train going up that grade. I don't know whether that engine could run a hundred miles an hour; I never tried it. No, I never had a speedometer on that engine. I have pulled cars with speed indicators on them. Yes, I suppose I have gotten up a speed of seventy-five or eighty miles an hour several times. Yes, I suppose I had one of the swiftest locomotives in the country, at that time. I think there are other divisions on the road where as fast time is made as between Washington and Atlanta. Yes, I mean to say there are scheduled faster than on that run. The West Point road takes the same schedule. The track was 90 pounds steel rails and well ballasted. Yes, I could have made a speed of 75 miles an hour, if it was necessary. My air apparatus was in good condition. We have got what is called a "service application" and an "emergency brake." We have a little lever, called the "engineer's brake valve," which moves around a quadrant. When this is put to the extreme pressure, it is called "in emergency;" the
73 full breaking power is then put on the train. Yes, it puts the brake shoes on every wheel as hard as the air will put them. Yes, I had driver brakes. That puts the brakes on every wheel of the tank and engine, except the pony trucks in front. Yes, I put the air in emergency about 75 feet from the crossing. Pardon me just a minute; at that mile post which is between 75 and 100 yards of the crossing, I blowed that second road crossing signal for these people. Of course, I was running all the time I was doing that, and when I turned my whistle loose, is when I jammed on the air. I blowed for that crossing and when I slammed on the air in emergency. Yes, that would only take a second of time. I suppose I was thirty or forty yards from the crossing, when I had finished blowing the whistle, and putting the air in emergency; I may have been fifty yards. The rear end of the train stopped two or three car lengths beyond the crossing. The engine was between 50 and 60 feet. The engine is about the same length as a coach; I think they are 55 feet. Yes, I ran about 355 feet beyond the crossing before I stopped. The space in which I can usually stop a train of that sort, depends upon the grade, the weight of the train, etc.; but I stopped that train as quick as I could possibly, to save my life. Yes, that was an illustration of how quick I could stop a train there, running thirty miles an hour. I saw the mule's nose coming from behind a clump of bushes. The mule's head was all that come from behind the bushes, and out in the clear. I did not see the people until I had blown that second road

crossing, and by that time they had gotten out in the clear. I could not see the crossing proper right there until after I had passed that mile post, on account of the curve. There is a very shallow cut there on one side of the road. There was a little clump of bushes on the right hand side of the crossing as I was coming south, at the edge of the right of way. That shut off my view of the people until they come out from behind them. Yes, I was at that mile post, about 75 yards from the crossing, before I could get a view of the crossing. I suppose the mule's head was fifty or sixty feet from the first rail, when I first saw it. I don't know the length of an ordinary mule. I never measured one. I don't know the length of a buggy. The width of the railroad track is four feet eight and one-half inches, I think. I caught the buggy between the front and the hind wheels, yes. The old man had gotten the mule across, and the front wheels of the buggy across, and the rear wheels were getting over when the pilot or pilot beam, one or the other, hit him. Of course, the
74 bottom of the pilot raised the buggy up, and the beam hit the wheel and turned his buggy over. Yes, if he had gone two feet further I expect he would have gotten clear. Yes, I say when the old man saw me, he began urging his mule up. I don't remember whether the mule got into a trot or not. When he looked up I was not in the act of blowing the whistle, I was trying to stop then. No, I was not in the act of blowing the whistle when I saw the mule's head. I had already done the blowing 400 yards back. No, I did not blow the whistle from that point until I got where I saw the mule's head. I blowed four blasts. It was not a cattle alarm, but a crossing alarm; I blowed the second road crossing whistle. By the time I had reached the crossing, I had slacked up some. Yes, I run 350 feet beyond the crossing. I held on the emergency brake until I got it stopped. That kept the full braking power on until it stopped. That brake don't lock the wheels, but if the track was slick it might lock them. On a track like that was, the pressure was that just short of locking the wheels.

Redirect examination.

By Mr. STRICKLAND:

When I blowed that second road crossing signal I expected them to stop; when I attracted their attention, I expected them to stop. No, he was not then in danger.

W. M. GAINES, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

On the 11th of October, 1903, I was road foreman of engineer-, or traveling engineer on the Southern Railroad. I still hold that position. It is my duty to ride on the engines on the division; to keep in touch with their general condition, and make reports of the same. The engineers and fireman are in my charge while on the line. I remember the occasion when the Kings were stricken on the 11th of October, 1903, at a crossing in Habersham

County. I was on the train that struck them. I was in one of th cars, but don't remember which particular one. I was in the smok ing department of a car, and I believe it was in a first-class coach

Yes, the engineer blew his whistle for this crossing when th
75 accident happened. In half a second after he blew the regu lar crossing signal I noticed that he blew another signal ju about the same as a road crossing signal, only it is of shorter dura tion; in other words, he blew it like he was in a hurry; and almo at the same time I felt the brakes come down in emergency, an then I knew something was wrong. Oh, yes, in the car I was in, could tell what brakes went on. It commenced to check the train It checks it pretty rapidly when the brakes are put in emergency The train came to a stop beyond the crossing, I suppose about a hun dred yards. I should think the rear end of the train was near a hun dred yards of the crossing; I did not notice it very particularly. did not see any part of the accident. Yes, I have looked to see, an a train can be seen for two or three hundred yards from the crossing standing at a point near the track, and coming from the direction Mr. King was coming. I have simply looked at it, but did not meas ure the distance at which it could be seen.

Mr. STRICKLAND: I now wish to tender the same evidence from this witness as I offered from Mr. Dewberry as to the number of cross ings between South Carolina and Atlanta, and the time it would consume to comply with the crossing act.

Mr. ARNOLD: We object to it.

By the COURT: The testimony is excluded. Let an exception be noted.

Cross-examination.

By Mr. ARNOLD:

I went back to see the people hurt. Yes, I think, approach ing that crossing, I could look up and see two hundred yards I think a man coming down that dirt road like Mr. King was, if he had looked could have seen a train approaching that far off. There is something that would shut his view off farther than 200 yards. There is a little clump of bushes there on the em bankment that would be between him and the railroad; but after he came from behind that, there would be an unobstructed view. There is a rise in the road, and probably the train would be out of sight at that distance. I say he might see the train 200 yards or

300 yards after he came from behind the bushes. After you
76 leave that point you wind around a hill, and then I don't suppose you could see it for quite a distance. But after you get from behind that clump of bushes, then you could see the train for 200 yards. No, you could not see it when you got there, unless it was within the range of your vision. A man coming from behind those bushes would be about 50 or 60 feet from the track. The right of way is 50 feet, is my recollection, and I think it is a little further back; about 60 feet I do not think there is anything to hinder a man from seeing a train on that curve. I do not think there is a reverse curve there.

(Picture No. 6 handed witness.)

A man standing on the crossing I think could look across this curve and see a train up here. No, I never tested it to see how far he could see it. I should think the engineer was running about thirty miles an hour. We were right on time I remember. I remember when we left Alto. I remember the first crossing south of Alto. He blew for that crossing; blew for all of them. No, I was not specially noticing whether he blew for the crossings on that trip, but I remember it occurred to me that he was blowing extra long signals. No, sir; it is not a fact that I could ride a hundred miles and not notice him blowing once. In the railroad phrase, he was "feeling good." Just before reaching the crossing, he blew two short blasts,—there is four; that is my recollection. The same signal as for a road crossing, only of shorter duration. The blasts were short, and that attracted my attention. There was not a soul in the smoking compartment with me. Yes, I noticed the blowing. He blew for the other crossing north of there. My recollection is it is about a half a mile north of this crossing. I think he blew for all of the crossings. I would not swear that he blew for all of them, but it is a part of my business to see that the men, especially the engineers, carry out the rules, and the fact is I spoke to Mr. Dewberry about blowing so long. I knew there was something wrong when I heard the alarm. It was a very short time after that that he put the brake in emergency. I could not say how far he was from the crossing when he blew, because I was inside the train. I think he would be about 200 yards of the crossing when he blew for it, but that is mere guess work. I suppose he could stop that train running thirty miles an hour in one hundred and fifty or two hundred yards. If he was running sixty miles an hour, it would take him at least three hundred yards to stop, I think. No, I don't know that he began to check at all, until he gave that alarm.

77 M. J. THORNTON, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

On the 11th of October, 1903, I was employed by the Southern Railway as locomotive fireman. On the day Mr. King got hurt I was firing for Mr. Ben Dewberry. I was on the engine with him. Yes, Mr. Dewberry blew the crossing signal before reaching Mag Wade's crossing. He also blew for another road crossing between that post and the crossing. Yes, I saw the Kings before they were struck, or just about that time. It is very hard to tell which was first; whether I saw them before they were struck, or just at the time they were struck. I was on the left side of the engine. I was looking out of the engine. When I first saw them, they were on the crossing. The hind wheels and rear portion of the buggy was struck back of the seat. I don't think any part of the train struck either of the occupants of the buggy; I cannot say positively about that. When the engine struck the buggy, it knocked Mr. King under the whistle post, or the crossing post, and those rock- that surround it. Yes, there were rocks around the base of it, and it seems that Mrs. King and her daughter intended to jump about the time

they were struck, and it knocked them up in the air. Mr. King was not knocked up at all. I saw Mr. Dewberry when he put on the emergency. At that time I had not seen the buggy. I did not then know what it meant. When he put on the emergency the train began checking. It ran beyond the crossing and then stopped. It ran about 150 yards beyond the crossing.

Cross-examination.

By Mr. ARNOLD:

I do not know how high in the air this little girl was knocked, but one of them seemed to be knocked a good piece in the air. I hardly think it was as much as twenty feet. I think at the coroner's inquest I stated that she was knocked about as high as the engine cab. I don't think I said then that she was knocked up to the smokestack, but that it looked to me as though she was knocked about as high as the top of the engine cab. She hit the ground. I don't know whether she hit any obstruction, or the buggy. I don't know whether she hit anything but the bare ground. When the engineer blew the alarm whistle, I think we were something like forty or fifty yards from the crossing. I had not seen the people then. It was not very long after that when I did see them. I
78 don't know whether I looked out on Mr. Dewberry's side or not. When the mule appeared on the crossing, I think we were at least twenty or twenty-five yards of it, when I saw it. The mule was partly across the crossing when I first saw it. I don't know that I first saw the nose of the mule come in sight. I saw the mule and the people at about the same time. I don't know how fast the mule was going. I think the mule was going in a lope. I did not see the old gentleman hitting the mule. I think we were running thirty or thirty-five miles an hour when Mr. Dewberry blew for them. I don't remember what I said about that before. I saw now it was running 35 or 30 miles an hour. I don't deny that I said forty miles an hour at the other trial, for I don't remember what I did state about *about* that. I think he could have stopped that train in 150 or 160 yards. I don't believe I said 140 or 150 yards at the other trial, but I say now it could be stopped in 140 or 150 yards; something like that. Yes, he put the air in emergency. The mule had got across, and the hind wheels and the back end of the buggy was caught by the train. I think three feet would have cleared the buggy all right. I knew Mr. Dewberry blew back there at the signal board. Yes, I do say I know he did. I don't remember about him blowing for the crossing just above that one; nor the one back of that yet. When he blew for Mag Wade's crossing, I don't know whether we were in sight of that crossing then or not. No, I did not know there was anybody on that crossing, nor that any one was going to be hit there. His blowing right quick did not attract my attention in the least; it was his putting the air in emergency. I did not know what he was blowing for within forty *forty* or fifty yards of that crossing, but thought he was blowing the crossing signal. Well, he had already blown the crossing signal a piece back there. He blows two or three crossing signals when it is necessary. He put the air in

emergency immediately after that blowing. I then looked, but I did not see anything for almost a second, looks like, and the first thing I saw was the mule's body, I think. Riding on the left hand side of the engine, I cannot see what is on the right hand side of the engine. I can see what is on the left of the engine.

79 F. BAXTER, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

On the 11th of October, 1903, I was a passenger conductor on the Southern Railway, and as such was in charge of the train which struck Mr. King. We were on time. The schedule for that train is something like thirty miles an hour, or thirty-five miles an hour. At the time of the accident we were running about thirty miles an hour. Yes, the engineer blew the crossing signal for Mag Wade's crossing. As well as I can recollect, I was in the rear car when we reached that crossing. We had three cars that day—engine and three cars. The engineer blew four short blasts of the whistle just before the brakes were put on, and the brakes went on in emergency. After he blowed the first road crossing, right after that he blew four short blasts. For the road crossing it is two long and two short blasts. Right after that he blew four short blasts close together. The brakes then went on almost immediately. The brake shoes reduced the speed of the train at once, and we stopped pretty shortly after we passed over the crossing. I did not see anything of the accident myself.

Cross-examination.

By Mr. ARNOLD:

I am just an extra passenger conductor. I am a regular freight conductor. The next road crossing above Mag Wade's crossing is, I suppose, five or six hundred yards. Yes, he blew for that crossing. The next road crossing is about the same distance above the next one. Yes, he blew for that crossing too. There is not very much difference in the distance between crossings there. There are a whole lot of crossing- along there. Yes, he blew for all of them. Yes, I remember him blowing for each of them. I could not tell you how many crossings there are between Atlanta and the South Carolina line. I remember he was blowing for those five crossings there, from the simple fact I was doing nothing and he was blowing the whistle all along there. I was attending to my own business. No, it is not a fact that the first whistle I noticed was the four short blasts. He blowed the road crossing whistle there at the blow post, I suppose. I believe that it is about four hundred yards from the crossings. Yes, sometimes I do pay attention to engineers blowing for road crossings. I could not tell
you how many trips I make a year over that line. I sup-
80 pose I make a hundred trips, and probably more than that.
Yes, I could tell you where he blows every time. At the road crossing above this there was nothing to attract my attention. I did not know an accident was going to happen. No, sir; the

engineer and myself have not been comparing notes as to the speed we were going. I put it as my opinion that we were going thirty miles an hour, simply because our schedule was thirty miles an hour, and we were right on time. Our schedule between Alto and Bellton is thirteen minutes to go that seven miles. No, we did not stop at Alto. We did stop at Bellton, and got a doctor there. Yes, we lose a good deal of time in stopping and starting at stations. No, we did not have any speedometer on that train. I was sitting down in the coach when he blew for these people. No, I did not look out of the window. I suppose the rear end of the train was seventy-five or one hundred yards beyond the crossing when it stopped. I could not tell you how far he was from the crossing when he blew those four blasts. He must have been close to it; must have been within fifty yards of it, I think. I felt the brakes go on in emergency. I could not tell you in what distance a train can be stopped, running thirty miles an hour. I should think, though, in something like 150 or 200 yards.

Redirect examination:

Yes, I said our schedule from Alto to Bellton was thirteen minutes and the distance seven miles.

By Mr. ARNOLD:

I don't deny testifying in the trial of a case involving this same transaction, that if a train is running thirty miles an hour, and the brakes go on immediately, and the engine reversed, it will run seventy-five or one hundred yards before it stops. I don't remember what I testified there.

J. C. BEARDAN a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

On the 11th of October, 1903, the day on which Mr. King's buggy was struck at Mag Wade's crossing, I was baggageman on that train. The engineer blew his whistle for that crossing. After that he blew a short, quick road crossing
81 whistle. Four blasts. Right after that I felt the brakes go on in emergency, the effect of which was to check the speed of the train. I did not see any part of the accident and don't know anything about it.

Cross-examination.

By Mr. ARNOLD:

Up to the time I felt the brakes go on, the engineer had not begun to check for that crossing. I don't know how far the next crossing is above that one. I don't remember whether he blowed for that next crossing or not. I guess I noticed him blowing for the crossings, but I don't remember it now. Yes, if he blows an alarm for somebody, that will attract my attention. I would naturally notice that. No, I did not know that any accident

was going to happen when he blowed at the blow post four hundred yards away. My attention was not called to any accident or trouble until he blowed those four short blasts. I could not say how far he ran after he blowed those four blasts, but I suppose between 150 and 200 yards. He was running between thirty-five and thirty miles an hour before he put the brakes on. At that time I was not doing nothing, just sitting on a trunk in the baggage car.

MELVIN WILSON, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

On the day Mr. King was hurt on the Southern Railway I was just about one hundred yards right down the track from the crossing. The train was coming south towards Atlanta, and King was going from west to east across the track. I was going home from meeting. I had been to church. My daughter was with me. We were traveling on foot, walking on the railroad. I heard the engine blow for that crossing, and just stepped off. I was walking at the end of the ties, me and my daughter. We had gotten about as far as from here to the back end of the room here below the crossing, when I first heard the train. This room is something like forty or fifty feet. I first heard the blowing of the train; I mean, heard the whistle. It was a long blow, just like I hear them blow a number of times up there. When I heard the train blow, I just spoke to my daughter and said we had better
82 traveled the dirt road, and she says "no, we can get off the fill," and it blowed three or four different spells. I heard it blow, and says, "it's coming, let's hurry and get off this fill." By "blowing two or three different spells" I meant blowing for crossings, I suppose it was. Yes, I heard it blow for Mag Wade's crossing. I know it blowed two crossing signals before it got to Mag Wade's crossing. Yes, I heard a noise of the running of the train, independently of the whistle. When I heard that, the train must have been away up towards Alto, two miles and a half from there. Yes, before it came in sight I heard it. After it blowed for Mag Wade's crossing I just stepped across to my daughter, who was on the other side from me, and I says, "yonder it is," and stepped out of the way, and turned around and looked at it. Yes, when I turned around and looked at the train, I then saw the Kings. They were then coming around that curve towards the track, on the dirt road, in a trot, all of them. Some one was ahead of them. Taylor Dodd and his wife, I suppose it to be his wife, was in a two-horse buggy in front and Mr. King's son-in-law and his wife, and Mr. Yarbrough and his wife was still in front, and Mr. King was in the rear. When I first saw Mr. King he was just making that curve around that bunch of bushes. Well that is something like sixty or seventy feet from the railroad track, I reckon. I reckon it is worse than that. I reckon it is one hundred feet, or close to it, where they were. They were just turning down that slant. I saw them from that time on, until they made the crossing. No,

they did not stop. They were driving in a trot, and remained trotting until they got down the slant, and until they got on the railroad crossing, when the mule began to walk over. Yes, there was a little rise there, like at all crossings. The track is built up there a little above the level of the ground. It is built up of gravel I think. I don't know how far from the track it went. I never have measured it. I cannot tell you whether they saw the train or not. It didn't seem to me just looking at them. The crowd did not seem to me to be looking for a train. Yes, the engine blew an extra signal. It was getting in a short distance it looked like to me, and it blowed two short blasts I know. I don't think they had time to do anything at all, but they tumbled out of there. I did not see them doing anything more than it looked to me the old man tried to slap the mule with the lines. After they came within my sight, and before going on the track, I never noticed them turning any head. If they had turned their heads before going on the track, I suppose they could have seen the train coming. It was in view then. Yes, they drove on the track.

83 Cross-examination.

By Mr. ARNOLD:

The old man did not notice the train that I saw. No, I did not see him turn his head and look at the engineer. I was looking for the train to come up. No, sir; I didn't know that he was looking at the engineer, and had his mule at a gallop going across that track. I say they were trotting until he started up that little rise to the track and quit trotting to walk over. Yes, when I first saw the old man and the train, the old man was 60 or 70, or may be 100 feet away from the crossing. Yes, I saw the train at that time. I don't know how far the train was from the crossing then, but it must have been something—the train come in sight of me about the mile post, and I don't know how far that is from the crossing. I think it must have been 75 or 100 yards from the crossing. I have not measured the distance the old man was from the track when the mule began to walk. It is just a gradual fill over the railroad crossing, but I am not a railroad man. If the mule was one hundred feet from the crossing when I first saw it, the mule trotted more than half that distance before he began to walk.

(To the COURT:) Yes, it is just one of those little raised places to get over the track, and it is ten, twelve, or may be fifteen feet. I never measured the distance.

(Mr. Arnold hands witness picture No. 5.)

I don't know that that is a picture of it. Yes, that is the dirt road. The rise would commence about here. Coming towards the railroad track, the picture shows the rise wrong. Mr. Gaines, I think, first discovered me as a witness; he took my name. I cannot tell you who subpœn-ed me in this case. Mr. Falkner here did not subpœna me this time. He has talked to me about this case a time or two. He subpœn-d me once or twice and Mr. Gaston has. Mr. Gaston told me he wanted me as a witness and to tell the truth, and that's what I want to do. I have not been sworn three times about this case, but

about this transaction I have. I don't know what they pay me a day for attending Court. They have paid my expenses. I think they will pay me two dollars a day. I don't know that I can tell you how many days I have attended Court in these cases. When the engine blew I was right in the neighborhood of one hundred
84 yards below the crossing. Yes, this is the crossing. Yes, it is a continuous curve to the left, a little bit. That crook is a little further up, I think. It has not as quick a crook as that shows on here. That is too sharp a crook right there. Yes, I was about a hundred yards below the crossing when it blew. Yes, it is a gradual curve to the left all the way, but it is not a sharp curve like that. No, sir; the train did not like to have caught us before we could get off the track. No, sir; I did not go back there and tell Taylor Dodd that me and my daughter had to scramble off to one side of her for I stood where I could put my hand on her. No, sir; she did not go off on one side, and me on the other, and the train did not nearly catch me. No, sir; I did not tell W. D. Dodd up there at the crossing that the train like to have caught me, and that I never saw a train going so fast. I did not tell Frank Yarbrough the same thing. When I first saw the train, it was coming about that mile post I I spoke of a while ago. Yes, I know the difference between a mile post and a blow post. I think the mile post is 75 or 100 yards from the crossing. I was looking for the train. I stepped off to one side, and was looking for the train, and as quick as it come in sight I saw it. I don't know how far it had gone from the mile post when it blowed. It might have been closer to the crossing than I could tell. When he got near the buggy he blowed two blasts, is all I noticed. No, he didn't blow four blasts when he got to the mile post; two is all I noticed. Yes, sir; it seemed to me but a second or two then before he hit them. Yes, he did blow about that blow post, but I could not see the blow post from where I was standing. If he blowed between that time and the time he blowed those two blasts, I did not pay any attention to it; but I did hear the two short blasts. I suppose all the time the engine was coming from that mile post to that crossing the engineer had a view of those people in that fifty or sixty feet to the track. I was not expecting anything; no, sir. No, I did not expect anything to happen until I turned around. Yes, I looked around and saw this old gentleman coming down the hill 60 or 100 feet away from the track. I saw the old man and the train about the same time. Yes, after I looked around I expected something was going to happen. Why, yes, all the time the old man was going that 60 or 100 feet the train was coming towards him. Yes, I think the engineer could have seen the old man after he got from behind those bushes, and the old man could have seen the train. No, sir; the old man seemed to pay no attention. I expected the
85 old man would have been safe if he had gotten two feet further across the track. It just caught the hind wheels of the buggy. I could not tell you how fast that train went over the crossing. I am not an engineer or railroad man, and never studied anything about the capacity of a train. I don't know that it did check up until it hit the buggy. It had but a short distance to go, and it did not stop like I could stop a horse and buggy. I know there

is a difference in the blowing for a station and a public crossing. Way up there it blowed two or three or four blasts; it was kind of "Toot, toot, toot," along there. I cannot tell you where it blew last before that; but still up the track. Then it blew just like I told you. I heard it and got off the track just as quick as I could step over to my daughter. I did not go over exactly when the train come in sight, but very shortly after.

Redirect examination.

By Mr. STRICKLAND:

After the train stopped I got on the train and went after the doctor. Yes, I walked back to where Mr. King was hurt. I then got on the train and went after Dr. Hathcock, Mr. Gaines *taken* [taking] my name right then and there. Yes, sir; on the former trial of this case the same questions were asked me as to whether I had not made those statements to Taylor Dodd, Will Dodd and Yarbrough.

Q. I will ask you whether or not they produced those witnesses to testify on that subject?

Mr. ARNOLD: We object to that.
By the COURT: Sustained.
(Picture No. 5 shown witness.)

I see a house, I reckon, then I see up there near the right of way. That is old man Wade's house, I suppose; Charley Wade. The whistle post stands right in front of his door. That is the whistle post for Mag Wade's crossing. Yes, that is Charley Wade's house I see in the picture.

86 Miss SARAH WILSON, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

My name is Sarah Wilson, and I am a daughter of Melvin Wilson. On the 11th of October, 1903, when Mr. King was hurt on the Southern Railway I was down on the railroad track. I was on the railroad, yes. I was south of the crossing, towards Atlanta. Yes, I stopped on the track. I think I was about a hundred yards from the crossing. Yes, I heard the train that day before it got to the crossing. I first heard it blowing. I heard it blow three or four times. It blowed some time apart. Yes, I have heard them blow for crossings. Yes, that train blowed for that crossing. Four blasts, I believe. Yes, I also heard the sound of the running train. I don't know how far it was away from the crossing when I heard the sound made by it running. No, I did hear it running before I heard it blow for Mag Wade's crossing. After I heard the train and knew it was coming, I just walked off the railroad to the side of it. My father was with me. Then I just turned around and looked back towards the train. I remained turned around until the train got to the crossing. I saw Mr. King and his family. They were near the crossing when I first saw them. They were in a buggy, driving a mule, and traveling tolerable fast. By "tolerable fast" I

mean in a trot. Yes, they looked at the train when they were near the crossing. All three of them turned their heads that way. At the time they did, that the train was in sight, and they could have seen it. Yes, they had time after that, and could have stopped before the train got to them. Yes, if they had stopped they would have been safe. When they looked at the train Mr. King drawed the lines back and slapped the mule. The train then struck the buggy. When I first caught [sight] of Mr. King and family in the buggy, they were something like fifteen feet, I reckon, from the railroad track. I mean the people were about fifteen feet of the track, and the mule was between them and the track.

Cross-examination.

By Mr. ARNOLD:

Yes, I said the people were fifteen feet from the track when the train came in sight. Between those people was the distance from them to the shafts, and the length of the mule ahead of them. No, I don't know how far that would be. I
87 don't know the length of the mule or the buggy. I don't know how far the train was away at that time. At that time I got a view of the train. I cannot tell you how far the train was from the crossing then. Yes, I have noticed the mile post about 75 yards up the track. I think the train was about the mile post when it came in sight. Yes, it was running very fast. The engineer blowed twice while the train was in sight of me. He blowed up at the mile post, and then just as he hit the people. He blowed one blast at the mile post. He blowed twice as he hit them. Yes, I have testified before in this case. I don't think I testified at Clarkesville that the only blowing he did was just as he hit the buggy. I think I did say on that trial that the "front of the mule was nearly up on the track just as the train blew." "The train blowed and he was knocked instantly off the track, blowed two short blasts." That was my honest belief when I testified it. I don't take it back, no. No, I did not notice the old gentleman and lady and girl until they got about fifteen feet from the track. I did not notice them as they circled around the hill. The buggy was not far from the track when I first saw them. Fifteen feet is not the distance from me to you. I would say fifteen feet is about as far from me to Mr. Faulkner. The mule was going in a trot. The mule was traveling fast until the time he got on the track. About the time he got on the track be begun to walk. Yes, I say the mule trotted until about the time he got on the track and then it began to go slower, and went slow until the train hit him. Yes, I went right back up there. No, sir; I did not tell Taylor Dodd or Will Dodd that my father and I came near being knocked off the track by the train, or that we just did have time to get out of the way. The train stopped about even with us, I think; the rear car. I guessed at the distance of one hundred yards south of the crossing, myself. Yes, I have told my father I thought it was about 100 yards. I have been paid two dollars a day for attending Court.

Redirect examination.

By Mr. STRICKLAND:

I say I think the train blowing is what made these people look around. I testified before on the other trial that the engine blew four times. It blowed two times then and these people looked. I say it blowed again after it blowed four times.

88 R. F. QUILLIAN, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I live at Bellton, Georgia, and have lived there thirty-three years. I know the Mag Wade crossing in Habersham County; it is three and a half or four miles south from Bellton. I have been familiar with that place all the time for thirty-two or three years. This picture No. 2 is a pretty fair representation of the situation at that crossing. I was up there at the crossing a short time after Mr. King was hurt there. I suppose about a month afterward. My nephew, I believe, asked me to carry him up there. He was going up there to meet some parties to take some measurements. It was probably later than that; it was when they were preparing for the other trial. I remember that Mr. King was hurt there. I pass there very often. There were present with me Mr. Hughes, Mr. Faulkner, my nephew, Ed Quillian, and the photographer; and there were a good many other gentlemen happened in there; just come in there; Mr. Wade, two or three of them. Yes, Mr. Patton was there. Yes, we took some views to see whether or not a man standing on the dirt road near the railroad track, and west of it, could see the track looking north. If I was standing within fifteen or twenty feet of the track, I don't just remember the distance I could see the track itself looking north, but it is a right smart distance, 200 yards or more. Standing in the same place I think you could see a train a half mile, off and on. I believe you could see it the whole way up to Charley Wade's house. That must be half a mile. But you understand the engine is up fifteen or twenty feet higher than the track. Standing at the point designated, fifteen or twenty feet on the west side of the track, and looking up towards Charley Wade's house, my recollection is there was nothing to cut off the view of an approaching train; the view might be cut off for a part of the way. If you had been a little closer to the railroad you could not have; but if you were 15 or 20 feet out there, I don't think there was anything to obstruct the view. We made a test by standing in the middle of the crossing and looking north, we could see a man 180 yards off. If he was put 20 feet from the crossing, I don't know how far you could see him. Yes, I saw this picture made. I don't remember just where the photographer stood when he took this view. This object here is a mile post. My recollection is the white spot at the end of your pencil is Ed Quillian and Mr. Patton in
89 a buggy. The buggy was some fifteen or twenty feet from the track, on the west side; on the side from which Mr. King

came, and the idea was to see if a man in coming along with a buggy there could have seen a train up here anywhere. I don't remember how far we could see him, but it was a long ways. We measured it, and some of them probably does remember it. I see a house located here in this picture No. 5. That is Mr. Charley Wade's house. His house must be a half a mile from the crossing.

Cross-examination.

By Mr. ARNOLD:

Yes, I went up there with my nephew, Ed Quillian. Yes, he is a lawyer for the Southern Railway. I don't know whether this is a blow post opposite Mr. Wade's house or not. There is a blow post about opposite his house. I think there is a road crossing at his house. I don't see any other blow post between here and there. Yes, it is a fact that the track winds around like a black snake in there; reverse curves. Standing in the middle of the track, there are times when the train would be in view, and at other times not. I have stood there before and since, and seen trains pass, and my recollection is, if you stand fifteen or twenty feet from the track, I think you can see a train to Charley Wade's house, and may be further. Yes, that depends upon whether you stop and wait; if you keep on moving the train would get out of view. I don't know anything about this accident of my own knowledge. I don't know anything about the conditions as to shrubbery, trees and so on, that prevailed at the time of this killing, for I have never examined it. I had passed there before, but never took any special notice except to stay out of the way of trains, and I could see. I don't know what timber has been cut off.

Redirect examination.

By Mr. STRICKLAND:

Yes, in coming around that hill before going down to the crossing, there is a place where you can see the track up the road. I think that space is probably 150 feet, or maybe a little more, or it might be a little less. That being about sixty feet from the crossing. From that point to the crossing, I don't think there is any point at which you cannot see a train approaching; you can see farther at some places than at others. What prevents
90 one from seeing as far at one place than another, is on account of the curvature of the road, and the bank on one side and the timber. I don't think there would be much to hinder you from seeing a train at a good distance up the road. The train is higher than the bank is on that side, and you could see it over the bank.

T. M. PATTON, a witness called and sworn on behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

Yes, I went to Mag Wade's crossing at the time some measurements were being made there a year or two ago. I live about

four miles from that crossing, and I have known the crossing for fifteen years, I expect. Coming from the west on the dirt road towards the crossing, you can see the railroad track up there from the crossing a piece. Sixty-two feet from the crossing, on the west side, seated in a buggy, you can see a train half a mile, I guess. Between that 62 feet and the crossing there is no place where you cannot see it. You can see a train at any point between that 62 feet and the track, and see it between a quarter and a half a mile off. You can see it above Charley Wade's house. I was sitting in a buggy 62 feet off from the track, and I saw a train coming. That 62 feet ends right close to the foot of that little hill, and is close to that bank there. The head of the horse hitched to the buggy was turned towards the track; and the rear wheels of the buggy was up the hill a little. Yes, I saw a train from that point. When I first saw the train it was near a half a mile; it was up to the next curve; next cut above that. I guess that it [is] near half a mile. I saw the train all the way from there until it got to the crossing. There was no time when it passed out of my view, until it reached the crossing. Oh, yes, I could hear the train running, and heard it before it come in sight.

No cross-examination.

T. B. SIMMONS, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I have passed Mag Wade's crossing in Habersham County several times. Yes, I have looked, and a fellow can
91 see a train coming from the north down there. A person standing in the dirt road, on the west side of the railroad track, ten, fifteen or maybe twenty steps from the track, and looking north, can see the track from there; and he could see a train approaching; it looked to me like three hundred yards up the road. From that distance from the track I do not know of anything that would prevent him seeing. I do not know of any place from the foot of the hill, coming in the direction Mr. King was coming to the railroad track, that a person could not see a train approaching. There is no such place there. Yes, I have seen Mr. King in his life, and have known him a right smart while. I did not know his age. I could not tell what his physical condition was a year or so before his death. He looked like an old man, and I don't reckon he was as stout as a young man.

No cross-examination.

W. S. MILLER, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I know this place called Mag Wade's crossing in Habersham County, where Mr. King was hurt in October, 1903. I will say a man standing thirty feet from the track, on the west

side of the railroad, could see the railroad track. From that point he could see the railroad track 900 feet, or something very near that. I could not tell you how far he could see a railroad train from that point, but a right smart little step up the road. He could see a train farther than he could see the track. From a point thirty feet from the crossing, on the west side of the track, there is no place where he could not see a train approaching; you could see the top of the engine all the way around that little curve, and coming around that little bank. Yes, I mean the curve in the dirt road the way Mr. King was coming. There is a bank there, but he could see the top of the engine over the bank, barely can see it. After you get to the foot of the hill, and within thirty feet of the track, then there is no place along there but what you can see an approaching train. I have known Mr. King all my life. I don't know how stout he was, but he said he was not able to make a living by hard work. That was in the summer before he got killed in the fall. He did not tell me what was the trouble, and I never asked him. I don't
92 know of any trouble he had. I know Miss Inez when I see her. I saw her about two weeks after she was hurt. She was then at home. When I saw her she was sitting on a bench on the porch with a little child in her lap, and she got up and walked into the house. The child looked like a little small fellow. When she got up, she took the child and went on into the house. Yes, that was two weeks after she was hurt, as near as I can guess about the time.

Cross-examination.

By Mr. ARNOLD:

Yes, I testified in this case before. I testified that I lived about a hundred yards from the Southern Railway, and about seven or eight hundred yards from this crossing where King was killed. Yes, I said I was home the day King was killed. Yes, I said "I heard the distress signal, but not the crossing signal; the distress signal was the first thing that attracted my attention." And I swear the same thing now. Yes, I was simply talking with old man King in casual conversation. I saw him working along occasionally, like a man of his age, usually. I don't remember that I ever heard him say what his age was. Yes, he looked to be 60 or 61 years of age, or older. I saw him driving mules, and saw him plowing some little, but very little. Yes, he had two plantations, or little farms, he looked after. When I saw this plaintiff with the child in her lap, sitting on the porch, was near two weeks after the accident. I live, I expect it is near a half a mile from Mr. King's place. No, I have not been there frequently since; just a few times. I have not seen her doing anything since, except sitting in a chair, and I saw her lying in bed at one time.

SAM DAVIDSON, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I remember the occasion when Mr. King was killed at Mag

Wade's crossing. I was at Calvin Wade's house that day. His house was off sort of east of the crossing, or southeast, and I think about 400 yards from the railroad. I could hardly tell how far from the crossing it is, I never did look at it much. It was north from the crossing. When the train passed I was standing by Wade's window, to see if I could see it. I heard the train blow by Mr. Gully's. It blowed one long blow. I could not see it from where I was. I was expecting to see it, but didn't and it blowed two blows, as well as I remember, right there at Mr. Wade's, and went on down where it knocked Mr. King off, and blowed two short blasts. Yes, I heard it blow at Wade's and above Wade's, and two short blasts at that crossing. Standing in the centre of the track at this crossing you could see up the track north, something like two or three hundred feet; you could see the track. Suppose you get off fifteen or twenty feet from the track on the west side, coming the way Mr. King was coming, and you could see a train a good piece; a quarter of a mile up that way, and probably further. Let a fellow standing at that point cast his eyes up that way, he could see a train all the way for a quarter of a mile, or may be further.

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Cross-examination.

By Mr. ARNOLD:

I was standing at the window and wanted to see the train pass, if I could. Yes, the house was a quarter of a mile away. I guess you could *not* see it if *it* had got on top of the chimney of the house, but I was expecting I could see it at some little point through there. I had been at that house once before. No, I did not know I could not see the train, but, as a matter of fact, I did not. I was not running with Gaston and Falkner, looking up testimony; I went on my own accord. The railroad has not promised to pay me anything. They have paid me for my time in these other cases, two dollars a day. Certainly, they pay me my expenses.

By Mr. STRICKLAND:

I was just going to Mr. Beattie's. That was last Friday or Saturday of last week. I was just going around with him, talking and having fun, and he was subpœn-ing railroad witnesses. I suppose he knew where they lived.

HAM DODD, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I remember the occasion when Mr. King was killed at Mag Wade's crossing, in 1903. I was at Mag Wade's that day. His house is on yonder side of the railroad from this crossing. It is north of the crossing. It is on the west side of the railroad. I was about 140 yards, I reckon, or something like that, from the railroad, and while I never stepped it, I was about 250 or 300 yards from the crossing. I saw that train pass, and I

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heard it. The first I heard of it was its blowing, right somewhere about old man Charley Wade's house. One blow is all I paid attention to; one long blow. One time is all I heard it blow. I was standing out on the veranda with my wife and Mack's folks. There was something happened that impressed the matter upon my memory about the train blowing. It scared my baby. My wife had the baby in her arms, and I told her to go gack into the house to keep from scaring the baby. At that time I lived two miles and a half below yonder. I have never examined Mag Wade's crossing to see if a man could see an approaching train if he was near that crossing; never paid any attention to it.

No cross-examination.

MACK WADE, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

On the day Mr. King was hurt at the crossing, I was at home when the train passed. Ham Dodd and some of my folks were there; Ham Dodd and I were together. Yes, Ham Dodd's wife and child were there. My house is north of the crossing and is on the west side of the railroad. It is something like a quarter of a mile to the crossing, or hardly so far. Where the railroad track passes my house, it is something like 135 or 140 yards. Yes, I heard that train before it passed my house. I heard it blow as it passed the house, and heard the racket of it. I paid attention to the blow first. It first blowed right passing my house, and my father's (Charles M. Wade's) house, but I was not paying any attention. His house is between me and the railroad, but it is a little further north. There is a blow post standing right in front of pa's house. It was Ham Dodd's baby first attracted my attention to the blowing of the train. His baby just got scared as the train passed. Every time a train passes it scares it, and it just kept crying and screaming, and it was blowing as it passed, and I turned and asked what's the matter with the baby? And Ham said every time a train passes it scares
95 it. That is how I came to notice it blowing. I have been at that Mag Wade crossing. A man standing in the dirt road, on the west side of the railroad, within, say, twenty feet of the track, and looking in a north direction, he could see a train coming something like betwixt a quarter and a half a mile; something along there. Yes, I have stood at that point and seen them passing. Standing at that point 20 feet from the track a train coming south would first get out of sight something like a half a mile up there. I have never measured the distance, but it is something like half a mile. It is beyond my father's house. You can see a train all the way until it gets to the crossing.

Cross-examination.

By Mr. ARNOLD:

I never paid any attention to how many blasts of the whistle I heard. I don't know how many it blew. Yes, my

house faces the railroad. I am about a quarter of a mile from this crossing. I know I heard the whistle, and that's all I know.

W. M. GAILEY, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

On the day No. 39 hurt the Kings I heard it pass. I was standing in my yard when it passed. My house is on the east side of the railroad, and about 100 yards from the track. It is north of the crossing where the accident occurred, between a quarter and half a mile. There were some people going down the road from church, and I had been to church, and had gotten in my yard and was standing there. My attention was — to these people as they drove on down, and then I heard the train coming. I first heard the train running. The noise made by the moving train, yes. Then I heard him blow his crossing signal. He first blew for the crossing north of my house. That crossing is known as the "Armanda Wade Crossing." Then I heard it blow south of my house, the crossing signal. I could not tell you where the blow post is located that he blowed for, but the second time he blowed, he was south of my house. He blew two long and two short blows. I didn't hear anything more until I heard him just a minute or two after he blowed that crossing signal, when he blowed two very short blasts. Yes, I have stood at that crossing to
96 see how far I could see a train approaching, I standing at a point a little west of the crossing in the dirt road. Standing at a point fifteen or twenty feet from the crossing, you can see up the road north a quarter of a mile. There is a space of 50 or 60 feet between the crossing and the hill on the dirt road, where you can see the track by looking. And any point in that 50 or 60 feet you could see a train coming, I should judge, something like 400 yards.

No cross-examination.

JOSEPH WALDEN, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I remember the occasion when the Kings were hurt at Mag Wade's crossing. The train that is said to have hurt them passed me. I was right up nearly even with Mr. Charley Wade's house. I was walking within thirty or forty feet of the railroad track. I was first attracted to the train by hearing it coming behind me. It blowed behind me. It blowed like it usually blows, the crossing whistle. It was up at the other crossing, I suppose, about half a mile away. It blowed again just as it passed me. I think there was a blow post right there. It blowed just as it passed me, and then just a little below me. When it passed me it gave the common signal they always give. I heard it blow again, yes. My attention was drawed next to two blows where it killed Mr. King. I heard considerable noise there, but I knowed there was

something wrong. I mean a noise made by the whistle of the engine. I could not tell you how many blasts, but two or three. Yes, I have looked to see how far I could see a train approaching from the north when I was standing on the crossing, and a few feet west of the track. If you stand right on the crossing, you could see it up, I expect, 70 or maybe 100 yards. I mean, you can see the track, and you could see the train all the time for nearly a mile. From the foot of the little hill, going in the direction Mr. King was, after you get to the bottom of the hill, and thence to the track, the character of the land is level for that 60 or 80 feet. In that 60 or 80 feet I think there is a little cut that will hide a part of an approaching train from your view. You could get within 20 or 30 feet of
the crossing going in the direction Mr. King was going before
97 you got to the point where you could see the train around that little cut. From that on you could see it, yes.

Cross-examination.

By Mr. ARNOLD:

I heard the train blow before it got to me, at the crossing above, and it blowed as it passed me. Yes, it blowed again. I did not pay special attention to the blowing until I knowed there was something wrong. I was paying attention when it passed me, and it blowed again. No, I did not know an accident was to happen. I had been on the track. No, I was not scared the train was going to hit me. I cannot tell all the places the train blowed that day. No, sir; I have not been talking with Mr. Falkner, nor with Mr. Gaston about it. No, I did not tell them what I was going to testify to. I told Mr. Strickland what I knew about it the other night. I told some of my neighbors around what I saw. There were three or four of my neighbors in the crowd. I don't know who subpœnaed me. The first subpœna I got was from a bailiff up in Clarkesville, and I don't know his name. Yes, I have and do swear that I have never talked with Mr. Faulkner or Mr. Gaston about this case. I suppose the railroad company is paying my expenses down here. I don't know what they pay a day. Oh, yes, I got two dollars a day at Clarkesville. I don't know how many blasts it blew for the crossing in question. I just suppose it was the crossing signal. I think it blowed two blasts. I could not tell you whether they were long or short; not very long, and not very short. It blowed once as it passed me, and it blowed a little piece below me. Yes, I heard it blow again as it hit the old man. I don't remember how many times it blew as it hit the old man. There was no one took me down to that crossing to see how far I could see up from the crossing. Of course, I have looked at it. At that time I was not expecting to testify in this case. If you had seen a man killed, would you have boked? No one ever talked to me about what I knew about it. I was on the railroad track when it happened. I told you I told some of my neighbors there about it, over a year afterward, and I suppose that's the way they found out what I knew.

By Mr. STRICKLAND:

I live now in Hibersham. I lived above Clarkesville then. When

I was subpœnaed for the Clarkesville Court is the first time I knew I was to be a witness. Yes, then I had a talk with you.

98 J. D. TERRELL, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

Yes, I was acquainted with the deceased, Mr. King. I have known him all his life, or about so. He was in the Confederate war, and that has been 44 years, and it seems to me he was about 21 years old when he went into that, or a little over. I will give him 64 years old. I know he was that much, if not more. Yes, that age at the time of his death. From what I know of him for several years after the war, he was not of much account, or claimed so to be. He did not work at all. He looked bad; looked unhealthy and claimed to be unable for service. I know he came to my house at the time he was getting up a pension, and said he was a broken down man, unable to work. That was several years after the war; two or three years after. Oh, yes, I have talked with him the last year or so before his death. Every time we would meet he would say he was a broken down man. He looked bad. He was sallow; he looked as though he was telling the truth. I should not think a man in his condition would be able to make a great deal. I should not think he could make more than fifty dollars a year.

Cross-examination.

By Mr. ARNOLD:

No, he could not take care of his wife and family on fifty dollars a year. I would not say he could take care of his wife and daughter and himself and pay taxes on his two farms on less than three or four hundred dollars a year; no, sir. I think he held his property and took care of it. I have heard him say that he was in debt, but I don't know myself really that he was in debt. I don't know much about his labor; no, sir. I lived about three miles from him. Sometimes I saw him not oftener than once a week. Sometimes I would meet him in Bellton. Yes, some men with a chronic habit of complaining get along very well. Yes, he complained of being in bad health after the war. Yes, he lived forty years after the war, and made a living for his wife and family; took care of them, and kept his two farms. I will admit that some men *are* in ill health, with good heads, can manage well, and are worth more then men who are well sometimes; but he was not such a powerful manager, according to my knowledge. He did not sell any of his property that I know of. I think he took care
99 of his family. He complained that in the war he got the measles and had a breast disease. Yes, he lived a long time after the war. I don't know anything about him paying out doctor's bills. His wife ought to know better what he could do than I do. She lived with him and ought to know. Yes, he kept his two farms intact, and raised a family of eight or nine children, and

took care of them, but they have all left. I suppose he took care of them when little. Most of them are married off, but not all, I guess. Yes, he did do well for his condition.

By Mr. STRICKLAND:

I suppose his nine children took care of him, and there is probably where the trouble came in. His children worked for him, of course.

T. F. HILL, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I live in Banks County and am ordinary of the county. I knew Mr. A. O. King. I was ordinary of the county in 1903, and still am. There has been no administration of A. O. King's estate. I do not know anything about what estate he had when he died. I had not been much with him since he made application for a pension. I don't think I saw him but once or twice since then. He made application between 1889 to 1890; I would not be positive what year. I sent the application down to the Pension Office. I have searched that office for it since, with "Tip" Harrison—Colonel Tip Harrison. I believe Mr. Faulkner was with us. We did not find it. He said it might be in the office, but it would take a good deal of work to find it. He told me that he would make search and let me know later on. Well, I did not make search particularly, because I thought it would be too much of a job, and I told him I would be down later on and assist him. He told me he would have the clerks look it up and send it to me. I don't know where it went to. Mr. A. O. King brought it to me. I don't remember that he told me at the time he made application what his complaint or condition was. I told him he would have to get two doctors. I think Colonel Oscar Brown assisted him in filling out the application. It has been three or four or five years since Mr. Faulkner and I went down to Atlanta to make search for it.
100 We went down there since this accident. I have not been to Atlanta since. I would not count him a very stout man. He might do light work, or something like that; light farm work; I think he might plow and hoe, and knock around the house, but I don't think he could have done manual labor. He was asking a pension as a Confederate soldier. I do not remember what disability was mentioned in the application. He claimed he was not able to work. It had to be that in order to obtain a pension. I don't remember about "total disability" being claimed. He did not get the pension. I think he could do work of a light nature.

Cross-examination.

By Mr. ARNOLD:

I say he was not stout; I mean he was not a fine, healthy, athletic specimen of a man. Yes, I have seen men of his age getting around and doing considerable work. I think he could have done plowing and hoeing, feed the stock, and little things

around the house. I could not say whether he could have done work around the farm, counting the management and all that, worth thirty dollars a month. I don't know how many farms he had. No, he had no administration on his estate. There is usually an administration when there are debts, and no administration frequently when there is no debts.

OSCAR BROWN, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I am an attorney at law. I remember that I did make an application for a pension for Mr. A. O. King. I assisted him in filling out the application for him. I don't remember distinctly the grounds on which he asked for a pension, but I think it was rheumatism. My recollection is that he said he had contracted rheumatism in the Confederate service. I don't remember what he said as to it partially or totally disabling him from work. I don't remember distinctly when that was, but between February, 1889 and 1891. The only trouble I recall him having was rheumatism.

101 Cross-examination.

By Mr ARNOLD:

Yes, a good many people with rheumatism do considerable work, especially the old soldiers. It was somewhere about fourteen years before his death that this old man made application for a pension. Yes, he got along fairly well after that, so far as I know. Judging from his appearance, I think he was a man who could hoe, attend to his team, feed his stock, and do things of that sort. No, he was not an invalid, or a bed-ridden cripple. My recollection is he said he contracted rheumatism in the Confederate service. My recollection is that his application was pigeonholed and refused. I think anybody who could show that they were disabled in any sort of way were entitled to a pension if contracted in the service. Not necessarily completely disabled.

T. S. FULLER, called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I know Miss Inez King. I remember the occasion when she was hurt at the crossing. I saw her the night she was hurt; the night the old gentleman was killed and she hurt. It was about dusk; I went over to the house, going into the door where the old gentleman was lying, and came on up into that house; stopped a minute, and there was a right smart racket going on in the kitchen department, the big house it used to be called, and some old ladies were in there, taking on mightily. I went on in there, stopped a minute, went out of that door from that house and met this young lady coming from towards the cow pen with a

bucket in her hand. That was the night of the day she was hurt. I stayed there quite a while. I did not stay all night. I was there at the inquest the next day, and saw her again that morning. She was then knocking about as usual. I did not see her again for the next two or three weeks. We had part of the inquest there, and then went to where the railroad boys were to come, to finish the inquest.

By Mr. ARNOLD:

I don't know whether she was suffering pain at the time she had the milk bucket or not. Oh, certainly, her back and side may have been hurt, and me not know it.

102 By Mr. STRICKLAND:

She was up a while that morning, and I saw her then in a little while in a little room on a pallet. I could not say when she got on the pallet. I could not say what caused it. A few minutes after I saw her on the pallet, Dr. Oslin walked into the room, and I walked in right behind him. I could not give a definite time as to how long that was after I saw her up, but it was not long. Col. Howard Thompson came with Dr. Oslin.

By Mr. ARNOLD:

No, I did not know Dr. Oslin was coming until I saw him there. I have lived at the same place since then. No, I have not seen this young lady at home frequently. I saw her last September in the chair at Clarkesville, and I don't reckon I have saw her since. I suppose it is two and a half or three miles that I live from the family. I have known them quite a while. I did not go over there that night out of curiosity, but as a neighbor, and because he was killed. If he had not been killed I would not have been there. Yes, I have visited the house before. No, I don't know anything about the young girl's physical condition, except I saw her with the milk bucket that night.

LEVY WADE, called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I know Miss Inez King and remember the occasion when she was hurt. After she was hurt I saw her at home. I seen her toting a bucket of water from the spring. That was about two or three weeks after the accident, I think. Yes I have seen her doing a few more things. I saw her toting a baby along about the same time. I don't remember now hardly what else I saw her doing. When I saw her toting the bucket of water, and toting the baby, were on different days. I talked with her after she got to the house with the water. Oh, yes; I know it was her.

Cross-examination.

By Mr. ARNOLD:

Yes, that was two or three weeks after the accident. I don't

remember when she got down and began to use this
103 chair. Yes, I saw her doing some other little things
along about that time, but I do not remember what all.
Yes, I have seen her since she has been using this chair at church.
I was right close to their house on these occasions; picking cotton
for them. I am not the daughter of the man who lives in front of
the railroad there. I am the daughter of Harvey Wade. Charley
Wade is my uncle. I could not tell what kin I am to Mack Wade.
Yes, all the Wades as witnesses here. I forget the name of the man
who brought me down here as a witness. Yes, I came on a pass.
They told me they would pay me two dollars a day, yes. Mr. Faulk-
ner is the one who talked with me about this case.

A. N. SHORE, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I know Miss Inez King. I saw her about two weeks after the accident, walking out on a little path towards the shop. No, she was not in the roller chair; am sure of that. I did not see her any other time after the accident. That was ten days or two weeks after the accident.

Cross-examination.

By Mr. ARNOLD:

Yes, that was about two weeks after the accident. I reckon it was before she began to use this chair. At the time of the accident I had been to a meeting and was going home. I was, I reckon, a mile and a half or two miles from the accident; north from the place of the accident. I disremember whether the old man with the whiskers was there at that time or not. There was an old man there, but I could not tell you who he was. I don't remember whether Mr. Waldrop was with me or not; I don't know whether it was him or not; I never saw him before. He looks mighty like the man to me. No, sir; I have not known him all my life. I don't know that I ever saw him before. I don't know whether I heard the train blow or not. I don't remember. This old gentleman was pretty close to me. I expect as close as from me to you. Him and old man Edwards were standing there. We three were standing there talking when the train went by. After the train got out of sight, we
all started home. We watched the train go out of sight, and
104 then we started on.. Yes, that was a mile and a half above
that crossing I expect. It was not running so very fast;
just going moderate. Yes, I heard it blow, I think down the road.
No sir; I have not stated repeatedly that it was running as fast as any
train I ever saw; it was running just about like it always does. I
could not tell you how many miles an hour. No, this old gentleman
and I were not on the track. The road runs around by the side of the
railroad there, but I disremember how far it was. Yes, I have seen
old man Waldrop at Court. I have seen him to-day in the room
there. Yes, I think I understand the one you are talking about.

By Mr. STRICKLAND:

We were up this side of old man Shurbrick's crossing. Yes, there are two trains that pass there about the same time, but the one I saw was coming down. I don't know whether there is or was a train that came down about the same time this one did. I don't know whether it was the same train I was looking at, that struck him, or not.

MARTI SHORE, called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I know Miss Inez King. Yes, I saw her within a few weeks after the accident in 1903. I saw her knocking around in the house and going to the door, taking her sister's baby up and come back with it, to save it from falling out of doors. It was a right smart little child, running around and walking about. I don't know how old the child was, but a year or over. That was on the 21st of October, in the same month they were knocked up in. Her father was buried on the 13th, and I was there the week after, on the 21st. I did not go there the night Mr. King died, but on the next day. I saw Miss Inez then. I cannot tell what she was doing, but she was knocking around, helping them get dinner. I don't know anything to tell in particular but that she was knocking about.

Cross-examination.

By Mr. ARNOLD:

No, I have not been there time and again since this little girl has been confined to her chair. I have not been
105 there—it will be two years the last of this month, or the first of next, when she was bad; they telephoned her brothers and sisters; they thought she was dying. Yes, she had a bad spell. She was in bed, but I cannot tell her feelings. I was there at that time, and one time after Christmas; after I was there on the 21st of October. It was after Christmas, but I don't know whether it was January or February after. When I was there after Christmas, she was not in the chair, but in bed in her room. She was not having bad spells then, she was just back there in the bed, and them is the only three times I have been there.

By Mr. STRICKLAND:

I cannot tell you the day of the month she had that bad spell, but it was the last of April or the first days of May, 1904. There were several there that day, I cannot tell you who all. There were no doctors there. I did not hear tell of the doctors being there that day. There were none there when I was there.

M. C. BEATTIE, called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I know Miss Inez King, and I saw her the night she is said to have been hurt during that day. She was then help-

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ing get supper cooking. I saw her again in about three weeks. She was then eating dinner, got up and took a chair, and went and sat down by the fire. I had but little talk with her myself the night she was hurt. I heard a conversation between her and Mrs. Masters. I heard her say it did not hurt her, or she was not hurt; something amounting to that.

Cross-examination.

By Mr. ARNOLD:

Yes, that was the night the old man was killed. I heard her say she was not hurt. She was then standing at the table. Nobody asked her if she was hurt. They were talking about something that way, and she come around and said that. I don't know whether anybody else heard it, but they were standing there. Mrs. Masters heard it for one. The old lady King was there, but I don't know whether she heard it. She was in the house. I don't
106 know whether Mr. Dodd, the son-in-law, was in the house or not. I reckon he was around there. I don't know whether Taylor Dodd was there or not. I could not tell you how many people were around there. There were several people there. I first told this to Mrs. Marti Shore; and I also told Mr. Faulkner so. No, I never told that young gentleman that. I don't think I have talked with him about it. He subpœnaed me. Yes, they brought me down here on a pass and pay me two dollars a day. This is the first trial of these cases at which I have testified. I am not the wife of Ham Dodd, but of Hamp Beattie, and we live in Banks County, about a mile from this crossing. My husband was with me that night at Mrs. King's. I went over that night just because I heard he was killed; I think I know these people very well. I have not been to their house since the young lady has been confined to her chair. I have only seen her once since, and that is at Clarkesville. I was there in three weeks after she was hurt. No, I had not seen Mr. Faulkner before I went there, nor Mr. Gaston, nor Mr. Quillian.

M. P. BROWN, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I know Miss Inez King. I saw her soon after the day she was hurt at the railroad crossing. I saw her coming from the spring something like two weeks, or ten days after she was hurt. She had a bucket in her hand. Mr. and Mrs. Hamp Beattie were standing by the buggy house. I did not see her another time out of doors; no, sir. The spring is about a hundred yards from the house, and may be more. There was nobody with her. I was within twenty-five steps from her. I then lived about a mile from the Kings. I now live about eight miles from them. I left there the twelfth of last January. No, I don't know when this roller chair went there. Yes, I know it did go there. I don't know that it has ever been away from there since it first went there.

Cross-examination.

By Mr. ARNOLD:

Yes, I know Frank Yarbrough, and have talked with him. No, I did not tell Frank Yarbrough that the railroad company would give two hundred and fifty dollars apiece for wit-
107 nesses to beat this case, and that I was in for the money. I never told him that, nor anything like that. No, I never told Frank Yarbrough that I was going "to ride your horse to death to beat this case." Yes, I know Mr. Faulkner and Mr. Gaston, and have talked with them about the case. Not before they subpœnaed me. I did not help find witnesses for them, or either of them. Yes, I swear that I was never present when any witnesses were subpœnaed. They pay me two dollars a day for what I have done for them in this case. I could not tell you how much I have done. I attended the Clarkesville Court, but was not put up as a witness. Yes, they paid me two dollars a day there, and never put me up. No, I don't know that I "have been going on messages in this case and riding for them and seeing people." Yes, I went over to North Masters one time, and they paid me fifty cents for that trip.

By Mr. STRICKLAND:

Mr. Gaston asked me to go over there to see if I could find Masters to give him a subpœna. Yes, I was hunting for a man to give a subpœna to for Mr. Gaston, and he gave me fifty cents to go and do it.

By Mr. STRICKLAND: I now read the evidence of H. H. MASTERS, by consent, as follows:

"I went to the residence of the Kings about three weeks after the accident; saw Miss Inez King walking about, and saw her coming from the spring with a tin bucket in her hand."

By Mr. STRICKLAND: I now offer in evidence the testimony of C. N. Wade, taken from the record of the trial in Clarkesville and used by consent.

Dr. G. HATHCOCK, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I am a practicing physician and have been since 1888. As a physician saw Miss Inez King soon after she was hurt in 1903 at the crossing. I suppose I saw her in an hour after she was hurt. I did not examine then, no. I don't know exactly
108 what she was doing then. She was around her father, who was lying in a dying condition, when I first saw her, and she was lamenting, or something like that, in mental anguish. I went down to the house with the old gentleman. I made an examination of her that same afternoon. I found a slight bruise on the hip, or near it. I don't remember which hip now. The bruise was what I call a slight bruise across the illium, or top part of the hip bone. I did not find anything else. She was not complaining then at all. It was quite a while after that that I saw her again. It was probably a month before I saw her any more. When I next saw her, I was sent for. She had some kind of an attack subsequent to this first time I

saw her, which seemed to be intensified, or got worse. When I went to see her that time she was in bed. I don't just recollect how long that was after the accident, but three or four weeks. When I saw her that time I thought she was suffering with painful menstruation; that's what I thought. I gave her something to relieve that. I saw her continuously for several times following that particular period; she and her mother both. I treated both of them after that time. Her mother was still suffering and still sick with a bruised hip, also, and much more probably than the younger one. I don't know just how long I continued to treat them, but I finally drifted out of the case. During the time I was treating Miss Inez I was treating her for menstrual derangement, or some functional disturbance of the reproductive organs, and for a slight mal-position of the uterus; a version of the uterus, which only demonstrated the menstrual disturbance. Female trouble is what it is usually called. It was probably in January after she was hurt that I saw her in company with other physicians. She did not seem to be satisfied, and Colonel Thompson asked me if I would object to a consultation, and I told him "No, sir; I would be delighted to have any good man he would suggest." He said, "have you any special man to suggest?" I said "No; any good man; Dr. Bailey, Dr. Ham, or any good, reputable man who was likely to understand such complications and such a disease as she seemed to be laboring under." Dr. Bailey was a specialist in female diseases; and he rather impressed me that he would get Dr. Bailey to see her with me. When the consultation resulted, it happened that Doctors Ham and Goss were there. I don't know at whose invitation Dr. Goss went there, but I think it was Colonel Faulkner's. That is my recollection. Yes, we got together and had a consultation, and made a pretty thorough examination of her. I had examined her before for myself.

109 At this January examination all the doctors examined her; made a physical examination and examined the uterus carefully. Yes, we found trouble with the uterus. We decided that it was anteversion. A version of the uterus is usually understood to mean the body of the uterus turns either one way or the other; that is in a version the entire body of the uterus turns. In this case the top part of the uterus had fallen forward, the uterus was not necessarily bent at all. Of course, if the top falls forward, the cervex would naturally be restrained; but you can philosophise on that the other way perhaps. I don't know that that is a common thing in maiden ladies. The history of such cases as that shows that such things often occurs in maiden ladies; and some of the authorities say that slight version is the normal condition. I could not say whether that condition was of long standing or not. Yes, we examined her reflexes for nervous troubles of various kinds. We found no particular symptoms directing our attention to any spinal trouble. While we found no intimation of nervous trouble, she was very nervous. That nervous condition may be attributable to many different things. If the uterus is affected in any way, you will get an almost innumerable train of symptoms, from uterine disturbance to nervous trouble. You will likely have great disturbance, almost anything will occur, with much derangement of the roproductive

organs. Yes, we decided upon a course of treatment, which treatment was for "female trouble" was the principal trouble, and everybody concurred in the prescription we decided upon. No, I did not see any necessity for a plaster jacket. I don't remember the date I saw her next; possibly it may have been a week, but I don't remember. The prescription we decided upon seemed to do her some good, and she acknowledged that she was much relieved by that particular prescription. That was in January, and I continued to go occasionally up until warm weather. She did not seem to improve any, and I drifted out of the case. No, sir; I did not make anything like a thorough examination after January. I examined her yesterday, but I do not call that a thorough examination. We examined her pretty thoroughly for her nervous trouble that possibly would arise from the spinal region. It is very difficult to ascertain positively whether or not the trouble existed in the spinal region. The trouble she now suffers with or labors under, it is very hard to determine whether or not it is of the spinal region; and then the character of the nervous trouble was one question of debate. Yes, we found her very nervous yesterday when we undertook to examine her. The amount of excitement in a patent to manifest a disturbance would largely depend upon the temper-ment of such patient. I should call her temper-ment a nervous one. I knew her before she was hurt. She was of a nervous temper-ment. She is not — a bil*l*ous temper-ment, or anything like that. "A young girl of her temper--ment, with a slight womb trouble, if she should stay in the house for two or three years; take no exercise; going about in a roller chair; taking practically no treatment, and had no spinal trouble," such a line of treatment and surroundings and environment are liable to produce similar symptoms, and the identical symptoms we found in her case on our examination yesterday. As to whether these symptoms are produced by any one cause, or from spinal trouble, we have a way of differentiating between lesions, symptomatic trouble and real trouble. I think the disease from which she is suffering I would understand as from a traumatic source, which means from any sort of injury or blow, and would call it traumatic hysteria. If my diagnosis is correct, that she is suffering from traumatic hysteria, the fact that she has a case pending would be one of the conditions that would be very conductive of the symptoms we found. The termination of the case, I would judge, would enter largely into and be one of the prime factors in her recovery. With the excitement of the case off her mind, I would say that I don't know that she would get well; I would be very slow to say positively that she would, but I think she would. Nobody can tell, but I believe her trouble is amenable to treatment, but it takes a good deal of time, and depends greatly upon the surroundings, the environment and the confidence of the patient to cure a patient like that. A patient who has been in bed for two or three years with traumatic hysteria takes longer time for them to get well. My home is at Bellton. I am professor of materia medica in Atlanta. I spend the winters in Atlanta, but my proper home is at Bellton. I am also a member of the State Board of Health.

Cross-examination.

By Mr. ARNOLD:

Yes, I am professor of materia medica in the Georgia Ecclectic College at Atlanta. I have been practicing since 1888. I am the local surgeon for the Southern Railway. I found a bruise on her hip. Yes, you will have concussion when there are no outward evidences of it. Yes, severe violence will some-
111 times cause death, when there is no outward evidence of it, or broken bones; and I have heard of people being scared to death. Yes, you can have a rupture of the blood vessels. The spinal cord is not subject to hemor-hage; no, sir; that is, the marrow inside the spine is not. The medulla oblongata is one end of the spinal cord, and the spinal cord is a continuation of the medul-a oblongato. The spinal cord seems to be the fountain head of the nerves and tissues which spring from the cord, yes, first we have the marrow, and then around that we have the bony structure, which bony structure consists of what is called the vertebra; little segments of bone; and around the whole thing you have a system of nerves and muscles that go up and down it. Oh, yes, it is possible to very severely strain the nerves and muscles that go up and down the spine. It is possible to get up an inflam-ation in the cord by a severe shock or violence. No, I don't know that inflam-ation would frequently happen from shock. It does happen from concussion; it is possible, yes. This young lady, when I examined her in January, had a version, or mal-position of the womb. Anteversion is simply a turning forward. Violence frequently produces that, yes. Yes, the womb is suspended in the pelvic cavity, like a balloon, and is held in place by a broad ligament, and smaller ones; and is shaped like a pear. The fundus, its top, points towards the umbilicus. Yes, a violent blow is subject to stretch or rupture these ligaments,and if stretched too much on one side, that will let the womb be pulled to the other side. The womb of a woman is very delicate and susceptible to changes. Yes, it is true that a woman who has had children, and whose womb is big and heavy, is much more liable to have it out of place than a maiden woman, or a young girl that has never conceived. The womb of a young girl is a very small thing. In a girl fifteen years old it would be larger than your thumb, but it is a very small organ. She is not nearly so liable to have it injured as an older woman who has had children. Yes, when this displaced condition of the womb is formed, it is liable to form adhesions. Yes, the inside of the womb has a musuous surface, and if it comes in contact with some thing, it is liable to form adhesions. When a new formation is occur-ing, you are liable to have more acute symptoms. You can have fever and inflammation or any train of symptoms, as I mentioned before, with a uterine disturbance; but a simply prolapsed uterus is not liable.

When the injury is fresh, the patient is much more apt to feel
112 pain and inflammation than if it is a case of long standing.

Yes, I thought it was her menstrual period that troubled her. I found the womb slightly out of position. Yes, she had pain at that time, or complained of it. It is true, yes, that in all cases of nervous troubles a great deal depends upon the history of the case in making

a diagnosis. I don't [think] this condition of the womb can be cured by an operation. I think the trouble we found, that is the last I have any knowledge of, was of such a nature that it is liable to result possibly in a process of natural development of her age and all that, in a permanent relief, and that she will get well all right. Yes, I think after a while she will get well. No, I cannot tell about that. I don't think it necessary to perform any surgical interference. Yes, they do operate in such cases; if they find a ligament that is too long, they take it up. Yes, they can sever it; but that is a question you know, in fact, that operation at the present time is fast fading out. We have another operation for that particular feature, to leave the ligament alone, and take the tension off by stitching the fundus to the abdomical wall; go down to the public region, and stitch that up, and the patient will get well. No, I have never been called upon to treat this girl for any womb trouble. Yes, I have been living in the settlement a long time. To the hypothetical question: "Suppose this girl is fifteen years of age, has never felt any pain; no doctor had ever been called to treat her; has just the ordinary experience that an average country girl has had, and suppose she was in an accident by which she was thrown out of a buggy anywhere from 12 to 20 feet in the air, and fell to the ground striking, as some of the witnesses think, in the neighborhood of the spine, anyhow the whole body indicating a very severe shock; and suppose after this these symptoms develop, wouldn't you naturally attribute it to the fall?" I would answer: Under those circumstances I would naturally think so. It depends entirely on the severity of the injury in a spinal trouble, especially where the inflammatory process is going on, whether the symptoms develop instantly, at the time of the injury is inflicted, or whether they are progressive. The same injury could produce shock that would produce death. Some cases might produce unconsciousness, and the patient get up and be all right; and some might not be so severe as to disable them at the time, and this process starting to work, might eventually disable them; but that is a different character of the injury. That injury would be what we call traumatic neurosis. Yes, some doctors call it traumatic neurasthenia and some traumatic neorosis. Yes, the most difficult cases with which doctors
113 have to deal are cases of traumatic neurasthenia or neurosis.

We do not have to rely upon what the patient says about suffering pain; we cannot tell whether the patient has stomach ache or not, but we always find a different expression in the face, according to where the pain is. Traumatic hysteria is one of those peculiar nervous troubles without any practical pathology. The simple fact that the male does not have a womb does not render him immune from traumatic hysteria. If a woman has also a prolapsed condition of the womb it is liable to intensify it. Yes, in these cases of traumatism, whether called traumatic neurast*h*enia or traumatic neorosis, the patient is liable to go to pieces from excitement. Yes, there is a lack of co-ordination in walking in this case; or in standing, or in any physical effort which requires the patient to direct his mind and muscles to one particular object. I do not think any conscientious physician would say positively that this young lady will

get well; but on the other hand I think it possible for a conscientious physician to say that she has no structural change that will result in permanent injury. I find in her case that the reflexes are exaggerated, which shows a nervous condition. I think she is suffering from traumatic hysteria, and the difference between traumatic hysteria and traumatic neurest-enia is very marked, and very striking, and the outcome of the case, or the progress of the case is quite different. Yes, I found the knee jerk in her very exaggerated. If we made the usual test for traumatic neurest-enia, we rather look to find if it did exist, whether the young lady is really suffering from traumatic neurasthenia or traumatic hysteria, and the only positive way of arriving at the difference between the two particular conditions is by a comparison of the reflexes and the way we measure these reflexes is simply by crossing the leg that way (indicating), and making a slight tap on the knee that way, which would, of course, respond very willingly. No, she did not know what I tested her for, but if she did, she could not help that. I do not know whether she was in a condition of nervous tremor after we put her through the test yesterday or not. I paid no attention to her afterward. No, sir; we doctors made a digital examination of her; it did not almost kill her, and she did not scream at the top of her voice. She made a little whining noise, but there was nothing like violence used. No, she did not scream. That examination was in January, 1904. No, sir; I did not tell Mrs. Masters the next day after the examination in January that I found a part of the spinal column extremely tender, for I never found it. I did not tell Mrs. Masters that, nor did I tell her I did think she would get well.

114 Redirect examination:

By Mr. STRICKLAND:

In this case I do not think there is any evidence of prolapsis. Version is not prolapsis. Yes, traumatic neurasthenia is indicated by being progressive. In this case I did not find the disease to be progressive. She is in fair condition now. She may be thinner than before, but the standard of life and her general expression is fairly good, compared with twelve months ago. Yes, I believe I could cure that patient; I believe that any reputable physician that could get the confidence of that patient could cure her. I believe the child will get well.

By Mr. ARNOLD:

No, I don't think a change of environment will cause a leg to grow back. I do not say that I know I can cure this patient. I expect I did tell her mother shortly after the examination of her in January, that I could do nothing more for her.

C. W. HUGHES, recalled, testified as follows:

By Mr. STRICKLAND:

The height of the dirt road is shown by that survey, and the highest point on the top of that hill on the west side of the track is thirteen feet, I believe, it is, above the top of the

rail. The hill slopes toward the track, and at the track, the track is eighteen inches above the ground level there. While I was in the roadway department we had that raised on what was supposed to be six inches of ballast. There is a barrow pit on the south end, and that pit is about one hundred feet long, and goes back into the cut perhaps fifty feet, and it is about one hundred feet across it. Between the foot of that hill, coming down from the west towards the track, there is nothing in the least to obstruct the sound coming from the north. The ballast I spoke of along there is crushed stone. The bottom of the ballast had to extend out 24 inches from the rail on either side. As well as I remember, that does extend out that distance now. No, sir; there is no cut at the crossing. Just before it gets to the crossing, it strikes what is known as the grade point, and there is no cut there.

No cross-examination.

115 Dr. I. H. Goss, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I am a physician and have been for thirty years. I am surgeon for the Southern Railway located at Athens, Georgia. Yes, I have seen Miss Inez King two or three times. I saw her first in January 1904, and I think again in October of the same year, and then the other day. At the time I saw her in January it was in company with Doctors Ham Hathcock and Mr. Thompson. We three examined her; Mr. Thompson was along, but he was not in the room. At the time we examined her, the examination was as thorough as there was any necessity for; we made a thorough examination. At that time there was very little evidence of any external signs of anything about her at all. The objective symptoms simply amounted to nothing at all; mostly subjective. Objective symptoms would be anything you could discover, any lesions, or something of that kind and the subjective symptoms is what the patient says. We got no objective symptoms. She complained of pain radiating across the back and chest and down the limb. Yes, we made an examination to ascertain whether she had any womb trouble. The womb was in what we call an "ante position" it was forward. There was a little womb anteversion, or rather it was more in anteflection. Anteversion is simply a bending forward. In fact, the womb in its natural position is a little anteverted; and the womb had been in that position long enough to cause absor*b*sion of the anterior portion. That anteversion could not have been of recent standing. It would take longer time; the front part of the womb would have to be absorbed to a certain extent in order to allow flec*t*ion to take place. It would take longer than two months. The accident happened in October, and I was there and saw her in January and the anterior wall would have been too thin in order to allow flec*t*ion to take place. It is a common condition to find among females, and after doing a good deal of special practice on that line, I find a good many cases of that kind among young girls. Sometimes it is congenital and exists from birth. Yes, it can be produced in other ways; you

can get it from painful menst-uation [menstruation]; in fact that is one of the causes of painful menst-uation [menstruation]; a change in the womb sets up more or less inflammation in the womb. Nervousnes- will produce it in a way, but that alone will not produce
116 it. Yes, you can get it from injuries; or fall, or jumping; but in most injuries, the womb is turned backward, and not forward. I don't see how falling on her back could produce a displacement forward; it would backward, but not forward. It would take a fall the other way to produce that. I think we all agreed perfectly as to what was the trouble with this young lady. The great trouble of which she complained that day, was painful menstruation. We had to take her statement of that of course, but on examining the womb and finding it in that position, it bore out her statement that she had pain. There was no difference between us on that point. My recollection is we prescribed that day; a prescription that is usually used in troubles of that sort; a viburnum preparation, or something of that kind was the principal prescription; and she seemed to have some difficulty in passing water, (inflam-ation of the bladder) as stated by her, and her mother also made the same statement, about a frequent voiding of water. She had a little inflam-atory trouble about the bladder. That could come from various causes. In a case like hers, it could be caused from the position of the womb pressing against the bladder; and could be caused from what is called residual urine; the amount remaining in the bladder all the time. A person may not suffer from that at all. They do not empty the bladder as well as they do at other times, and the amount of residual urine ferments and sets up cystitis. She had pain radiating from the spinal cord, but we did not find any actual disease of the cord itself. I saw her next, I think in October, 1904. She seemed to be about the same thing. I saw her twice before then, and I must have seen her in the spring. I saw her soon after the plaster jacket was put on, and I think that was in June. Her condition was pretty much the same then. I saw her next at the court in Clarkesville, and she was then pretty much the same. I next saw her here the other day. The examination made this week was not as thorough as when I first saw her. We did not make any special examination of the genital organs. No, sir; we did not think it was necessary to make an examination (digital) of the genital organs. We examined her reflexes mainly; what is called the patilla reflexes. There were present Doctors Bloomfield, Hathcock, Ham and myself, and the patient and her mother. The only objective was this reflex. Of course as to the nervousness we had to take the patient's word a good deal for that. Yes, we had to ask her questions about
that. She answered some of the questions, but her mother
117 answered most of them. The girl did answer some. She seemed to be terribly excited, and her mother said she could not answer them, and for that reason her mother undertook to answer them. I call her present condition one of traumatic hysteria instead of neurasthenia. In traumatic neurasthenia there is always an injury of some kind, a shock to the spinal cord, which produces symptoms different from what we get in this case. Taking the patilla reflex; in neurasthenia the reflex is exaggerated, but when you strike

the knee, it is all over at once. In the case of the girl, you get the reflex, but there is a continuance of it, or rather more of a tremor. That is one of the distinguishing features of it. In neuresthenia you would also have a disturbance of the functions of the bowels, the bladder, and in fact all the organs, more or less, and no control of the nerves. In neuresthenia, as a rule (there are exceptional cases) it would not remain nearly the same as in this case; it progresses. In traumatic hysteria it would remain about the same without disturbing any special functions. When I examined her this week, I thought her condition was improved, except this extreme nervousness. Yes, hys-eria is a general disease itself, and so far as the patient is concerned, it is just as real as anything else; and in a great many cases where you can find no patent cause, they have the hysterical condition just the same. Traumatic hysteria to remove all the causes is more easily cured. Traumatic neuresthenia would be more progressive, and fewer cases relieved entirely. In this case, from my knowledge of this case, and the history of it, and the examinations I have made, I think the lawsuit, and the excitement about it retards her recovery. In the case of every nervous patient, you have to have the confidence of that patient, and of course you have to have good surroundings and treatment to a certain extent, and in a case of that sort, without more injury than the girl has got, I do not see any reason why she should not get well. In all nervous cases, the physician has to have the confidence of the patient, else the treatment don't amount to a great deal. Hyst-ria, to make it plain, is simply a disease of the nervous system. There is no real pathological or diseased condition that can be found, but simply a nervous disorder. Sometimes hysteria may be based on some other disease, and may be a symptom instead of a disease. You can have it in most any part of the body. Yes, a man may have hysteria, and have a still leg.

118 Cross-examination.

By Mr. ARNOLD:

I examined this girl first I think in January 1904. I went there as the surgeon of the railroad. Yes, I am also a brother-in-law of Mr. Strickland. Yes, I found an anteverted condition of the womb, or more of an anteflection. In anteversion, the whole body of the womb turns forward. Anteflection is when it is bent upon itself like my hand is now. (The doctor nor [now] draws a diagram of the womb anteverted, and anteflexed.) The anterior wall is back here. No, it cannot well have a wrinkled fold in it that will allow it to give. I have examined a great many, and I have found them all thin. Anteversion can take place, but as a rule it is a displacement backward where they fall upon the back. Anything that will give force from above down may produce anteversion. I don't know that the contortions of the body on being knocked twenty feet in the air might produce it, before she ever hit the ground. A great strain might produce it. Any strain, by being thrown up in the air would not produce it. Yes, the womb is held up by a ligament. That kind of tissue cannot expand and contract. Yes, it is true that a blow on one side of the head will produce a fracture on the other side of the head. Yes, one of the symptoms of

this change in the condition of the womb, was painful menstruation. The menstruation comes from the womb. If there is no abnormal condition of the womb, there is pain attending menstruation, but the flow does not come through a new channel, but through a narrowed channel. Yes, painful menstruation is one of the evidence that there is trouble with the womb, if there has never been any such pain before. To this hypothetical question; If this young lady had no trouble with her womb, before, and had falled from a buggy, exactly how we cannot tell, but she was thrown from twelve to twenty feet in the air and some part of her body hit the ground, and after that, in two or three months this painful menstruation for the first time in her life developed, and an examination disclosed that there was an anteversion of the womb; a turning of the whole body of it, what is there except the violence to attribute it to? I would answer: "If there had never been any trouble there before, you can attribute it to something like that; but some cases, if you will allow me to make this explanation the girl was about fourteen years old when she was injured. Some girls menst-uate [menstruate] for a while at each period, more or less congestion taking place, and
119 they get after a while, in two or three years, they have painful menstruation; and you cannot say it is always from an injury. But, of course, if there was no other symptom in it, and it followed this injury, the injury would be the most natural thing to attribute it to. Traumatic hysteria is hysteria due to an injury. Yes, it is a well recognized condition with doctors, in the last few years. I think this young lady is suffering from that more than anything else. That condition may last any length of time. Yes it might last her all her life, or it might not. Yes, that condition might result in paralysis of the leg or the arm; partial or complete paralysis. Of course if the limb was paralyzed, the patient is helpless, so far as the limb is concerned. Yes, that is strictly a nervous condition, due to an injury of the nervous system, and it very seldom would come from an injury to the spine. It might result from a shake up to the nervous system, and if the person is inclined to be hysterical at all, it would naturally turn that way. Yes, if a person was inclined to be hysterical, any injury could produce that condition. To the hypothetical question: "Suppose this young lady had just been an ordinary country girl before this, and had lived as the average country girl has, and suppose she sustained a severe shock having been thrown from a buggy from 12 to 20 feet in the air, and striking on the ground a very heavy blow, suffering pains in the back and hip, and in the head, and her symptoms gradually got worse until the end of three or four weeks, or a month, she developed into this condition, what would there be but the injury to attribute it to?" I would answer that if a person is nervous and hysterical an injury would more likely produce that condition, and it could be attributed to that injury. She is of a nervous temper-ment [temperament], and the injury, shock and excitement, and all that, might produce it.

Redirect examination.

By Mr. STRICKLAND:

As to painful menstruation as produced by this condition

of the womb, the flow would have to reach the point where the flow was obstructed, before there would be much pain from that cause. I never could get at it, as to whether she suffered pain before that or not. I asked the question a good many times, but never could find out. Yes, I stated that I thought she would get well of her trouble. As to what it would cost to cure her, would depend upon where you had her for treatment. In a case
120 like that she would have to be taken from the family, and to a good place for treatment, in other words, treatment beside medicine. You must take her from her present envioro-ment [environment], and as I said a while ago, the physician must have her perfect confidence, and then you could make it cost from five hundred to a thousand dollars. If I were going to treat the case, I would want her away from the family.

By Mr. ARNOLD:

No, I cannot say what is to become of this case.

J. C. BLOOMFIELD, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

I am a practicing physician, and have been practicing since 1888. I am not a surgeon for any railroad, nor am I your brother-in-law. I saw Miss Inez King day before yesterday, in the presence of her mother, Doctors Ham and Hathcock, and Goss, and some other man, I don't know his name. There was another man who rolled the chair in, but I don't know who he was. I really could not say whether that man (her brother) is the one or not; perhaps he is. We made a very superficial examination; it was impossible to make any other in the roon. It was simply subjective, asking questions, with an examination of the patilla reflex. It was impossible, simply because she could not be stripped there and examined. It is a very difficult matter to say as to what her trouble is, she may have one of three conditions. It may be pure hysteria; it may be neurasthenia as a result of spinal irritation from an injury, or it may be entirely put on. You cannot tell as to which of the three it is. Of course a man may have his own opinion. The girl looked as though she suffers, and she is undoubtedly very nervous. I am not in a position to state which one of the three conditions it is. I never did see the case before then. I did not see anything in her case that would prevent a permanent recovery. I could not say as a physician whether she could be cured or not. It is absolutely impossible to give an opinion as to whether she would, or would not recover. As to the probabilities, I can give them; The probabilities are that she will recover. In order to affect a recovery it would be necessary that she be removed from the family; all mental causes of excitement removed, and that she should be put under proper treatment, prefer-
121 ably in a sanitarium where she is entirely under control. Yes, the lawsuit itself would be an exciting cause preventing her recovery. I should think the probability is she will get well. If

the case was to come to me, I would give her a favorable prognosis, under these circumstances. To accomplish that, in a sanitarium, it would cost anywhere from five hundred up to possibly a thousand dollars, depending upon the length of time.

Cross-examination.

By Mr. ARNOLD:

Even then, I could not be positive that she would get well. You can look at her and see that she is very nervous. To some extent she looks enemic, but that might be her normal condition. I could not determine that the reflex was exaggerated. The moment the reflex was struck, there was a jerking all over the body, which made it uncertain. I told her nothing about the purpose in striking her. I think the nervousness all over is genuine. No, the condition of the womb cannot be put on. A woman herself cannot have the womb anteverted at one time, and then back at another time. That condition of the womb frequently follows injury, and follows a strain. I should judge that the straining of a person knocked up in the air by a sudden lick from a locomotive, and the straining of the muscles of the body while in the air, would not produce the condition of the anteverted womb; I should tnink it would be the fall that might produce it. Yes, the force of the first impact that knocked her out of the buggy might produce it. If the blow was very sudden, it may produce it, because the effect of that would be practicallv the same as a blow. Sometimes an anteversion of the womb is a very stubborn condition for a woman to have cured; it is as a rule amenable to treatment, however. Yes, you can amel-oriate [ameliorate] the situation and you can cure it. Yes, traumatic hysteria results frequently in an inability to use the leg, or the arm, or both arms. Traumatic hysteria is hysteria due to an injury. Traumatic neurosis is a case in which the spine is involved. In all these cases, to get at the true condition, you must get a history of the case; you cannot arrive at the truth without it. A great deal depends upon the honesty of the patient.

Q. Let me put this sort of a case to you: Suppose this young lady was fifteen years old, and had been an ordinarily healthy
122 country girl, and just about the average girl in that situation, and suppose she had been riding in a buggy over a crossing, and a train running anywhere from thirty to sixty miles an hour struck the buggy, knocked her father out and killed him, so violent was the blow; knocked her mother out, and knocked her anywhere from twelve to twenty feet in the air, and she fell to the ground, couldn't that lick in the buggy, without the lick on the ground, have produced this womb trouble?

A. Yes, sir. It could also produce this traumatic hysteria and could also produce traumatic neurosis; and either one of them could account for her present condition. It is possible that her injury may persist, but a majority of these cases do get well. Yes, I say the probability is, with proper treatment, she will get well. I could not say how long it would take to cure her. I don't know whether

some of these cases last five or ten years or not. I don't believe any of those conditions would last a life time. I think they would last, under proper treatment, anywhere from six months to a year, or probably two years, and they would get well under proper treatment in that time. Some cases might persist longer. It is just possible that some would persist a life time. This womb condition is a mechanical condition and the way to treat it is by mechanical support to the womb, and keep it there long enough to get it in its normal condition, and the ligaments to regain their strength. In my experience, these ligaments, after they get their strength, the womb is held in shape by those ligaments. Yes, sir, the ligaments do regain their strength when once stretched. If the ligaments were ruptured, it would be permanent, but I never heard of one being ruptured; not the ligaments of the womb. Yes, traumatic hysteria is a painful condition to the patient. It is annoying and painful. As a rule, patients with hysteria, sleep well. Neurasthenics do not. Anteversion of the womb is an objective condition; that is something you can feel. And that reflex is an objective symptom. If a perfectly normal woman stepped suddenly off a step, may prolapse or antevert a womb, but it would take a very considerable jar to do that. Stepping unexpectedly off a step might do it, yes. Following this injury, if there is a tenderness along the spine, that might indicate any one of the conditions I spoke of; either the hysterical condition of the neurasthenic condition.

Q. Let me put this case: Take a girl, as I have said fifteen years old, never had any trouble before, and was thrown out of a buggy, and who dragged along three or four weeks, doing the best she could, undertaking to do various things she had done before, but got worse all the time, and at the end of four weeks was confined to her bed, and remained in that condition, or, as you find her now, to what would you attribute that condition, except to this injury?

123

A. Nothing.

Redirect examination:

Yes, I stated to Mr. Arnold that being struck in the rear would produce injury to the womb. If the buggy was struck, it would depend altogether on the amount of the jar the patient had; a jar or a blow, or a sudden lifting of the patient, that would give the same effect as a sudden dropping of the patient down. If the blow was from behind and upwards, it would probably produce retroversion. It might also produce prolapsis. If you had prolapsis you would probably have retroversion. A blow from behind would not *like* [likely] produce anterversion. Traumatic anteversion could be the result of one blow. Where the womb is in a bent condition, on the convex side you would *fine* [find] nothing, but on the concave side you would find a thinning of the wall of the womb. It takes time to produce that condition.

Q. Suppose the girl had an accident on the 11th of October, and in January following, she was examined, and this thinning of the walls of which you spoke was then apparent, I will ask you whether or not that was a sufficient time to produce that?

A. I don't know what time would be necessary to produce it. When a young girl reaches the menstrual period, painful menstruation is a very common thing. That is true of girls that have not been hurt. Girls of that age are frequently found not to be in a normal condition as regards the womb; you frequently find the womb to be crooked or bent, or not in position.

(Counsel for the defendant now offers in evidence the two maps referred to, No. 1 and No. 2. These are admitted without objection.)

J. C. BEARDEN, a witness called and sworn in behalf of the defendant, testified as follows:

By Mr. STRICKLAND:

Train No. 39, is at is known as the local vestibule and No. 37, is the other vestibule. *No.* [Nos.] 37 and 39 runs in the
124 same direction. I don't know exactly, but I believe they run an hour or an hour and a half apart. Occasionally they do run close together, depending upon whether one is behind time.

No cross-examination.

Here the defendant rests its case.

Counsel for plaintiff now reads in rebuttal the interrogations of Mrs. Harriett Masters, and Mrs. Dodd.

W. T. DODD, recalled in rebuttal, testified as follows:

By Mr. ARNOLD:

I know Mr. Wilson and his daughter. They came up there just after the accident happened. He then said that he had to run down off the fill to keep the train from hitting him. I disremember what his daughter said.

Cross-examination.

By Mr. STRICKLAND:

Yes, this was immediately after the accident. These Wilsons had come back from where they were to, where the old man was. They said they had to run off the fill to keep the train from hitting them. Yes, the train ran beyond where they were, and they ran "down the fill," they said to keep the train from hitting them. Yes, the train did go beyond where they were. Yes, I was examined in a former trial of this case at Clarkesville. I there stated that I carried Miss King to the funeral of her father on a sp-ing bed, not in a spring wagon. I don't think I stated that she had never been able to walk since she was hurt up to that time; I said she could walk a few steps at a time.

Q. Wasn't this question asked you: "Q. Has she been able to walk, except just in the house there on a chair, or something?"

A. After two weeks.

[Q.] Did you say anything about any two weeks at this trial? Did you not swear she never had been able to walk since the accident?

A. I think I did.

125 Q. "Has she ever been able to walk except just in the house there on a chair or something? A. No, sir." Didn't you say that?

A. I disremember. If I did, I didn't mean to swear that.

Q. "Has she ever been able to wait on herself or get out of the house during the entire time?

A. No, sir." Did you answer that?

—. I say after two weeks.

Q. Did you say anything about any "two weeks" there?

A. I disremember about that.

Q. I will ask you this: "Q. Do you remember when the inquest was held?

A. I believe it was on Monday.

Q. Where was she that day?

A. She was on her bed."

[Q.] Did you swear that?

A. Yes, sir.

Q. You swore at that time nothing about any two weeks. You said she was on her bed, not able to walk from the beginning?

A. I don't think I did. I would not be positive I did. It don't seem to me I did. When I had this conversation with Mr. Wilson, it was right after they were knocked out of the buggy, and before he died. He lived something like an hour I suppose. Mrs. King was up, at that time. I disremember where Miss Inez King was. Yes, Wilson went on that train after a doctor.

Miss INEZ KING, recalled in rebuttal, testified as follows:

By Mr. ARNOLD:

Yes, I have seen Mrs. Beattie, Ham Beattie's wife. If I ever told her on the night of the injury or at any other time that I was not hurt in the accident, I don't remember anything at all about it.

Cross-examination.

By Mr. STRICKLAND:

I told you I did not remember for certain when it was I got my roller chair. Since that time I have not done without it part of the time. Yes, it has been at our house all the time. It was carried to Clarkesville. It was away several days. I said it was several days, I don't remember how long. I don't remember what day of the month it was. Yes, I remember it was in 1905.

126 By Mr. ARNOLD:

When the chair was taken to Clarkesville, I was in a plaster cast then, and I could walk a little better than since, and I sat in another chair. I just did the best I could without it. The roller is a more convenient way for me to get around

than an ordinary chair. The chair was not loaned to Mr. Finley, at Gainesville. Yes, that is where it went. I did not know who the man was. Mr. Cicero Cagle came for it, and brought it back.

By Mr. STRICKLAND:

I don't know what Mr. Cagle's occupation is. I suppose he is as fat as you are. Yes, the chair was also sent to Clarkesville, at the last Court. I don't think it was sent about two weeks before Court, but a day or two. I have been there once. Yes, I think it was there only a day or two before me. Yes, it had to go to Alto, to put it on the train to go to Clarkesville. I don't know how long it stayed there, nor how long before I got it back.

HOWARD THOMPSON, a witness called and sworn in behalf of the plaintiff in rebuttal, testified as follows:

I had previous to the time the chair went to Gainesville, furnished the chair to the little girl, and during the time she had it. Mr. Finley was taken down sick, and was very feeble for a long time, and I was waiting on him. I went to Mrs. King's, and asked the little girl if I would furnish her a spring bed or a mattress or something for her to lie on, if she would let me have the chair for a little while for Mr. Finley. I had the chair brought to Bellton and sent to Gainesville, and Mr. Finley used it for a time, and immediately after that, as soon as I could after his death, I sent the chair back to the little girl, and she kept it then until we got ready to go to Court, at Clarkesville. I went there and made arrangements with a livery stable man to put her on the spring bed I had furnished her and put her in a hack and carry her to Clarkesville, and had the chair sent to Alto, and from there by express to Clarkesville. When we were through with the case it was sent back to Alto, and then to her house, where it has been ever since. I don't think the chair was in Gainesville over a week. I put him in the chair and rolled him around his place one day, and he died shortly after that. Yes, he was an almost
127 dying man then. Yes, the little girl loaned me the chair. It is really my chair; I furnished it to her. It was left me by a friend, a man who died in Gainesville, and his wife gave it to me.

No cross-examination.

(Counsel for the defendant now reads in evidence a portion of the testimony of W. T. Dodd, taken from the record of the trial at Clarkesville. This is read without objection.)

Here the case closed.

This is the evidence complete, except certain maps and photographs and blue prints which it is convenient to incorporate in said Bill of Exceptions.

It is ordered that the map or maps, photographs and blue prints, introduced in evidence, and, which are referred to in this Bill of Exceptions, and, which it is inconvenient to incorporate in said Bill of Exceptions, be made a part of the same, and that the originals of such maps and photographs and blue prints be sent by the clerk as a

part of the record in the case to the Court of Appeals, and that such originals be considered as a part of this Bill of Exceptions. Let them be certified by the certificate of the clerk.

This November 17th, 1906.

WM. T. NEWMAN,
U. S. Judge.

We agree to the above.
This November 17th, 1906.

REUBEN R. ARNOLD,
HOWARD THOMPSON,
Att'ys for Deft. in Error.

Filing: U. S. Circuit Court. Filed in clerk's office, Nov. 17th, 1906. O. C. Fuller, Clerk.

128 We agree that the within is a correct brief of the evidence in the trial of the case of Josephine King, vs. So. Ry. Co., and of the case of Inez King vs. So. Ry. Co., except the maps and photographs introduced, and the depositions read, which are in the clerk's office, and we agree shall be treated as part of this brief the same as if they had been embodied.

We further agree that this brief shall be used as the brief in each of said cases with the same addition of maps, photographs, depositions, etc., above mentioned.

This Oct. 27th, 1906.

JNO. J. STRICKLAND,
HOWARD THOMPSON,
REUBEN R. ARNOLD,
Pl'ff's Att'ys.

Approved upon agreement of counsel and ordered filed. Oct. 27th, 1906.

WM. T. NEWMAN,
U. S. Judge.

During the progress of said case, the plaintiff moved to rule out the question and answer propounded to Ben Dewberry, a witness for the defendant which answer was as follows:

There are between ninety and one hundred crossings on the Southern Railway, between the South Carolina line and Atlanta.

Plaintiff's counsel objected, as follows:

I object to the question and the answer, because incompetent, immaterial and inadmissible, I think the entire case should be confined to this crossing.

Defendant's counsel then stated, as follows:

"I expect to prove that between the South Carolina line and Atlanta, there are practically one hundred road crossings or between eighty-five and one hundred public road crossings; that the distance is one hundred and one miles, that the crossings in some localities are very close together, and within a few hundred yards of each other, and at others further apart, but on the average making about a crossing to the mile almost. We expect to show further, that to observe

the statute, and check and keep checking so as to have the train
129 under control, and to stop should any person or thing be on the crossing, it would consume from five to ten minutes for each crossing, dependent, of course, upon the weight and length of the train and the grade; but it would make an average of seven or eight minutes. We wish to show that this train was made up and known as No. 39, the vestibule train which runs from the City of Washington, through the States of Virginia, North Carolina, South Carolina and Georgia, that it was carrying passengers from one state to another, also carrying an express car with freight on it, from one state to another. We wish and expect to show that obedience to that Crossing Act would hinder and practically prevent interstate business being done by the defendant railroad. We wish to show the conditions I have just stated all existed at the time this accident occurred on the 11th of October, 1903."

The testimony was excluded by the Judge, and an exception to this ruling noted.

At the close of the evidence, defendant's counsel moved the Court to direct a verdict for the defendant, on the grounds which are fully set out in the sixth ground of the motion for new trial herein contained, which motion the Honorable William T. Newman, Judge presiding refused, and exceptions were allowed and noted. The case was then argued before the jury, and defendant's counsel requested the Judge in writing to instruct the jury, which requests are set out verbatum in No. 5, of the motion for new trial, herein contained.

The Judge then instructed the jury as follows

"GENTLEMEN OF JURY: We are now trying two cases together, gentlemen one of them, that of Mrs. Josephine King, against the Southern Railway Company, to recover from that company for the homicide of her husband, and to recover the full value of his life. We are also trying the case of Miss Inez King, whom being a minor, sues by her mother as her next friend. She sued for damages which she says she sustained in the same accident by which her father met his death. The two cases, as I stated to you are being tried together, and the jury will find separate verdicts in each case. The number of the case of Mrs. King, for the death of her husband is No. 21, and the other case is No. 26. You can distinguish them
130 when you see them, as there are two declarations which you will have with you, and you will find separate verdicts in each case.

"Under the statutes of Georgia, gentlemen, which have been referred to, it is the duty of engineers of trains in Georgia, when approaching a crossing to blow the whistle, and as stated to you by counsel and to check and keep checking their trains as they approach the crossing, so as to be able to stop them if any person or thing should be upon the crossing. That is the statute of this state, and it is entirely clear that they were not doing that in this case, so there is no question that the railway company through its servants and agents was guilty of negligence. I therefore, instruct you as matter of law that the defendant through its servants agents and employees was guilty of negligence.

"Now, notwithstanding the negligence of the defendant railway

company through its employees, if the deceased, Mr. King by the exercise of ordinary care on his part, could have avoided the consequences of defendant's negligence he, if he had simply been injured and not killed, could not have recovered against the railway company, and his widow suing for the value of his life, cannot recover in this action. Although the railroad company is guilty of negligence as I have instructed you it was, she cannot recover if Mr. King himself by the exercise of ordinary care could have avoided the consequences of that negligence."

"The burden is on the defendant to show this, and in this case the defendant company relies largely upon the evidence of Mrs. King and Miss Inez King.

"If the deceased saw the train approaching while he was still in a position of safety and before going upon the track, and he attempted to cross in front of it, under what are the undisputed facts of his case as to the proximity of the train, this would be negligence on his part without doubt, and his widow could not recover in this action.

"If by the exercise of ordinary care and prudence by the use of his sense- of hearing and of sight, the deceased could have ascertained that the train was approaching and avoid the accident, his widow cannot recover in this action for his death.

"It is the duty of persons approaching a railroad track to use their senses, and to look out for danger. A railroad track is itself a signal of danger, and persons about to go on or to cross a railroad track should exercise due care and prudence to avoid danger; and, if they fail to do so and are injured, they cannot recover, notwithstanding the fact that the railroad company through its employés is guilty of negligence.

131 "If you do not believe that the deceased was guilty of such negligence in going upon the track as would defeat a recovery under the rules I have just given you, but if you believe he was guilty of negligence in going upon the track, but did all he could to save himself after the defendant's negligence became apparent, his widow might recover, but, instead of recovering the full value of her husband's life, the sum she would otherwise recover should be reduced in proportion to the negligence attributable to the deceased; except, that, if his negligence was as great as that of the railroad, Mrs. King cannot recover at all for her husband's death. This is a rule of law called comparative negligence. If you believe the deceased was guilty of some negligence in that event, the plaintiff may recover if all was done by him that could be done to save himself and avoid injury, after the negligence of the defendant became apparent, but you would reduce the recovery which you would otherwise find, in proportion to the degree of negligence you think attributable to the deceased.

"Now, if you do not believe the deceased was guilty of any negligence, but that his conduct was that of a careful and prudent person under all the circumstances, in going upon the railroad track, then the plaintiff can recover the full value of his life.

"In the opinion of the Court, the negligence, if you believe there was negligence on the part of the deceased, the father, cannot be im-

puted to Miss Inez King in her suit. Her father was driving, and it was his act, of course, which put them in peril, but she would be chargeable with the decree of care her age and experience required. The rules of law I have given you on the subject would apply to her to the extent you may believe they should apply; they would be the same as to her as to her father; that is, a child or young person would reach an age when they would be accountable and governed by the same rules of negligence as an entirely grown person. It would be for you to say in view of her age and the fact that she was with her father and he driving, whether the rules of law I have given you should be applied to her. To the extent you believe they apply, they would be the same to her as to her father. Counsel have argued the question whether any negligence of her father can be imputed to her. The Court is of opinion that you cannot charge her father's negligence to her in her suit.

"If Mrs. King is entitled to recover, she is entitled to recover the full value of her husband's life, except in the event you should believe that the deceased was guilty of some negligence, which
132 I have just explained to you, but not to the extent as to defeat a recovery, when you would deduct from any sum you would otherwise find, an amount in proportion to his negligence, that is, the proportion that his negligence bears to the negligence of the defendant company.

"Some tables have been offered in evidence which you can use or not, as you see proper. They are introduced to aid you in arriving at a proper calculation. This is simply a financial matter, and there is no sentiment about it. The deceased is said to have been sixty-one or sixty-two years of age. These tables will show what his reasonable expectancy was. It is said to have been about thirteen years. Then we have the annuity table which has been worked out by actuaries, by which, if you use it, you would multiply the amount you may find his annual earning capacity after deducting any sum you think it should be reduced on account of some negligence of his, and then ascertain from these tables or otherwise, what you think the present value would be, and give Mrs. King such amount as you think would be the present value of his life. Mr. King was sixty-one or sixty-two years of age; and in doing this it would be your duty to consider the vicissitudes and exigencies of human life. At times men are sick; old age was coming on him very rapidly and his capacity of labor would grow less, and finally cease entirely. As I say, it is purely a financial matter; a matter of calculation as to what the value of the remainder of his life would be.

"If you believe that Miss King is entitled to recover, she is entitled to recover such amount as would compensate her for the injury sustained in this accident. It is a matter submitted to the enlightened conscience of impartial jurors. I can give you no rule for ascertaining her damage. Her damages should be compensatory, and you should find this amount in justice and fairness to both parties.

"If you believe she is not seriously injured, you should find accordingly. If you believe she is seriously injured, you should find in that view of the matter. It is all a matter for you to determine in fairness and justice to both parties.

"Some testimony has been offered to impeach some witness, (the two Wilsons) by proof of previous contradictory statements. That is one of the methods of impeachment known to the law, that is, by proof of previous contradictory statements. How far this has been done in this case, and the effect it may have, is entirely a matter for the jury to determine. You have heard the evidence, and whether there was any real conflict or not, it is for you to say, and how far it tends to impeach the testimony of the Wilsons is for you.

133 "It has taken some time to try this case. I have tried to go through it carefully, and I ask for it your serious and thoughtful consideration.

"You should find a separate verdict in each case. If you do not believe either [is] entitled to recover, you should say, "We the jury find for the defendant." If you do believe either or both entitled to recover, fix the amount in each case, and say, "We the jury find for the plaintiff $—," whatever the amount may be.

"Mr. STRICKLAND: Before the jury retired, your Honor submitted to the jury the question as to whether Mr. King could have seen or saw the approaching of danger. What I apprehend you intended to say was, 'If he saw or by the exercise of ordinary care could have seen the approach of the train."

"By the COURT: I intended to do that. I intended to give some requests of yours, and I will do so now. They are as follows, gentlemen: I further charge you that the care to be exercised by the said A. O. King, in approaching a crossing and railroad track, is that care which an ordinarily prudent person would exercise for his own safety. What would or would not amount to negligence in the manner in which a person entering upon a railroad track would depend, to a large extent upon the peculiar location of the place at which he went upon the track." That is right. It depends very largely upon all the surroundings. "An ordinarily prudent person in the possession of all his faculties should not attempt to cross a railroad track at any place without at least using his sense of sight if not that of hearing, to discover whether at the time and place he was about to cross the same, there were present any of those dangers which a person of ordinary intelligence would reasonably apprehend."

"If you believe from the evidence that the view from the direction in which the train was coming near the crossing was so concealed, that A. O. King could not see whether or not the train was approaching, then I charge you that it was his duty to act as an ordinarily prudent person would under such circumstances; and, if you believe this condition existed, and Mr. King drove on to the crossing without having stopped and listened, and, if he had listened would have heard the approach of the train in time to have avoided the injury, then I charge you that his widow cannot recover in this case."

134 "The whole thing is, if he could by the exercise of ordinary care and prudence, that is by the use of his senses of sight and hearing before his danger, could have seen the approach of the train or could have known of its approach while still in safety and could have avoided it, his widow cannot recover for his homicide."

"Of course you understand that this does not modify the rule I gave you on the question of comparative negligence.

"Mr. ARNOLD: I desire to call your Honor's attention to the fact that no negligence of the father can be imputed to the girl.

"By the COURT: Negligence of the father could not be imputed to Miss Inez King. I charge you that. I charge you, also, as I have before, that, if you believe that she had reached the age, as these gentlemen have urged, that she herself should be charged with contributory negligence, the rules I have given you on that subject will apply.

"Take the case, gentlemen."

Order was taken by consent of counsel to try the case of Inez King, by next friend, vs. So. Ry. Co., and that of Josephine King, vs. So. Ry. Co., together; said order being as follows:

"It is by consent, ordered that the two cases above stated be tried together, and that the evidence introduced shall be applicable to each case as if it had been alone upon trial, and separate verdicts in each case shall be rendered.

This April 24th, 1906.

WM. T. NEWMAN,
U. S. Judge."

The jury thereupon retired to consider their verdict, and having returned into Court a verdict for the plaintiff for eight thousand dollars, the defendant took a consent order allowing it sixty days in which to file a motion for new trial, and within the time, to-wit: on the 21st of June, 1906, moved the Court to set aside verdict and grant a new trial, which motion is as follows, to-wit:

135 In the United States Circuit Court for the Eastern Division of the Northern District of Georgia.

..... Term.

No. 26.

INEZ KING, by Next Friend, JOSEPHINE KING,
vs.
SOUTHERN RAILWAY CO.

Suit for Damages.

"Verdict and judgment for plaintiff on April 27th, 1906, for $8,000.00.

"And now comes the Southern Railway Company, defendant in the above case, within the time provided by the order granted on the day said verdict was rendered and before the final adjournment of said Court, and moves the Court to set aside said verdict and grant a new trial upon the following grounds:

1. The verdict is contrary to the evidence and without evidence to support it.
2. The verdict is contrary to law.

3. Because the Court erred in limiting the argument in the case to one and one-half hours to the side, practically four days having been consumed in putting in the evidence and two cases being tried together, being this, and that of Mrs. Josephine King, against the Southern Railway Company.

4. Because the charge of the Court to the jury was given during a terrific hail storm. While the Court allowed the jury to stand up as near as practicable around the Judge's bench, the noise made by the hail storm, the thunder and confusion incident thereto, was such, as movant insists that it was impossible for the jury to hear a greater part of the charge and impossible for them to have understood connectedly the instructions of the Court.

5. Because the Court erred in refusing to give in charge to the jury the following requests of defendant's counsel, made in writing and handed to the judge before the argument began, to-wit:

136 (1) "If you believe from the evidence in this case that at the time the husband of the plaintiff, Josephine King and the plaintiff, Inez King were injured, the railroad was guilty of negligence in that its engineer failed to check and keep checking the train from the blow post to the crossing upon which they were hurt, or in failing to blow the signal as the statute requires, or running at a reckless rate of speed, yet, after the negligence of the railway company began, if it was apparent to A. O. King, that the engineer was not checking the train, or it would have been apparent had he been in the exercise of the care of an ordinarily prudent person, and that said railroad was not in the discharge of its duties as to giving signals of the approach of a crossing, but that it was coming to the crossing at a high rate of speed, and it was in the power of the said A. O. King to have avoided the danger from the negligence of the defendant by the exercise of ordinary care, then neither plaintiff in these cases can recover."

(2) "I charge you that it appearing from the evidence, that A. O. King, the husband, and his wife, Josephine King, and his minor daughter, Inez King were riding in a buggy of the said A. O. King and being driven by him, that the negligence on the part of the said A. O. King was attributable to his daughter, Inez King, and, if under the rules I give you in charge, such negligence would have prevented the said A. O. King from recovering had he sued, the same would prevent either Josephine King or Inez King from recovering."

(3) "I further charge you, that, if you believe under the evidence in the case that the plaintiff, Josephine King and her daughter, Inez King, and her husband, A. O. King, were driving in a buggy approaching the crossing where they were injured, and, if you further believe that had they stopped and looked or listened, they would have discovered the approach of the train in time to have avoided the negligence of the defendant company in failing to check or in any other negligence being committed by it, and you further believe that they went on such crossing without having stopped and listened or looked for the approach of the train, then I charge you that neither Josephine King nor Inez King can recover in these cases."

(4) "I further charge you that the care to be exercised by the said

A. O. King in approaching the crossing and railroad track
137 is that care which an ordinarily prudent person would exercise for his own safety. What would or would not amount to negligence in the manner in which a person entered upon a railroad track would depend to a large extent upon the peculiar location of the place at which he went upon the track. An ordinarily prudent person in the possession of all his faculties would (should) not attempt to cross a railroad track at any place without at least using his sense of sight, if not that of hearing, to discover whether at the time and place he was about to cross the same, there were present any of those dangers which a person of ordinary intelligence would reasonably apprehend."

"NOTE.—The Judge gave this request in charge, except he substituted the word 'should' for the word 'would,' which as movant insists, changed the whole force of the charge.

(5) I further charge you, that, if you believe from the evidence that if A. O. King had stopped immediately before crossing the railroad, that is, a few feet from it, and had looked, that he could have discovered the approaching train for a considerable distance and he went on the track without so looking, when, if he had looked, he could have discovered the approach of the train, or, if he had stopped and listened, could have heard its approach and thus avoided the accident, then I charge you that neither plaintiff in these cases can recover."

(6) "If you believe from the evidence that the view from the direction which the train was coming near the crossing was so concealed that A. O. King could not see whether or not the train was approaching, then I charge you an ordinarily prudent person under such circumstances would have stopped and used his sense of hearing, and, if you believe this condition existed and A. O. King drove on the crossing without having stopped and listened, and, if he had listened would have heard the approaching train in time to have avoided the injury, then I charge you neither plaintiff in these cases can recover."

(7) "If you believe from the evidence that A. O. King did discover the approaching train before driving onto the crossing and yet drove on, believing that he could cross before he was struck, then I charge you that neither plaintiff can recover."

138 (8) "The rules of law given you in charge as to the duty of railroads to blow and check, etc., at crossings only apply to the crossings at public roads established according to law."

(9) "Unless the evidence satisfies you that there is either an act of the legislature of Georgia or a judgment of an inferior Court or Court of Ordinary or the County Commissioners for Roads and Revenues, of Habersham County, establishing the road in question as a public road, or the evidence satisfies you that the road has been in continuous use as a public road for twenty years as it is now located, then, under the law, the road in question is not a public road such as the law contemplates when it requires the railroad to blow for the crossing. This is true, regardless of whether or not there was a blow post or crossing signal or how the railroad company itself had been treating it."

(10) "If you believe from the evidence that Dewberry, the engineer saw the Kings going toward the crossing but in a safe place, he had a right to presume they would not go on the track and there was no duty on the engineer to take any steps in regard to them until it was apprehended they were in danger or intended going on the track."

"6. Because the Court erred in refusing to direct a verdict when the same was moved for at the close of the evidence in the case, which was in words as follows:

"Now comes the Southern Railway Company, the defendant in each of the above cases at the close of the evidence of each, and moves the Court to direct a verdict for the defendant in each upon the following grounds:

"1. Because the evidence fails to show that this defendant was guilty of any negligence which was the proximate cause of the injury to the husband of plaintiff, Josephine King, or to the plaintiff, Inez King."

"2. The evidence fails to show that the place where plaintiffs were injured was a public crossing established as required by law and a place where this defendant, under the statute of Georgia was required to check its train.

"3. The evidence shows that the plaintiff and A. O. King, who was the husband of Josephine King, and father of Inez King, drove onto the crossing without using their sense of sight or of hearing
139 to ascertain whether or not the train was approaching at the time and place, if they had used either the sense of sight or hearing, they would have discovered the train was approaching and was not checking for that crossing; that after they discovered or had they been in the exercise of the care of an ordinarily prudent person, would have discovered that the defendant's train would not check for the crossing in question, by the exercise of their senses they would have then avoided the consequences of defendant's negligence, if such existed.

When the entire evidence is tested by the rule laid down in Lucas, vs. Brooks, 22 Wallace, 116, to-wit, "the true rule in the case is, that, if to the judicial mind the evidence, tested by the law of the issue and the rules of evidence is not sufficient to justify the jury fairly and reasonably in finding a verdict for plaintiff, the Court should so tell the jury," the verdict should be directed.

"Wherefore, it prays that the verdict be directed in its behalf."

"7. Because the verdict is excessive.

"Wherefore, it prays that a new trial be granted.

JNO. J. STRICKLAND,
Att'y for So. Ry. Co.

The foregoing motion read and considered.

The recitals of fact therein contained are true.

It appearing that the reporter cannot prepare the brief of evidence in this case, owing to its volume and other engagements earlier than July 14, it is therefore ordered, that Inez King show cause before me at the Court room in Atlanta, on Saturday, July 14th, at ten o'clock A. M., why a new trial should not be granted as prayed.

In the meantime, and until further order, it is ordered that this motion and order shall act as a supersedeas to the verdict and judgment in said case.

It is further ordered that plaintiff or her counsel be served with a copy of this motion and order unless the same be waived.

Let the motion be filed by the clerk.

This June 25, 1906.

WM. T. NEWMAN,
U. S. Judge."

140 This motion was continued from time to time, and was finally set for the 27th of October, on which day an amendment to said motion was filed, which is in these words:

In the United States Federal Court for the Eastern Division of the Northern District of Georgia.

INEZ KING, by Next Friend, JOSEPHINE KING,
vs.
SOUTHERN RAILWAY COMPANY.

Two Suits for Damage; Tried Together; Verdict for Plaintiffs, and Motion for New Trial.

By permission of the Court, the defendant in each of the above stated cases further amends its motion for new trial by adding thereto the following additional grounds:

Paragraph VIII.

Because the Court erred in striking an amendment filed by defendant which is now of file, setting up that the statute of the State of Georgia requiring defendant's trains to check before reaching the crossing, contravenes the commerce clause of the Federal Statute; the same being stricken on motion of plaintiff's counsel upon the ground that the amendment did not set up a legal defense.

Paragraph IX.

Because the Court erred in ruling out the evidence of Ben Dewberry in these words:

"There are between ninety and one hundred crossings on the So. Ry. Co., between the So. Carolina line and Atlanta," which was objected to by plaintiffs, as follows:

"I object to that question and the answer, because incompetent, immaterial and inadmissible, and I think the entire case should be confined to this crossing."

When defendant's counsel stated as follows:

141 "I expect to prove that between the South Carolina line and Atlanta there are practically one hundred road crossings, or between eighty-five and one hundred public road crossings; that the distance is one hundred and one miles; that the crossings in some

localities are very close together, and within a few hundred yards of each other, and at others further apart, but on *but on* the average making about a crossing to the mile, almost. We expect to show further that to observe the statute and check and keep checking so as to have the train under control, and to stop should any person or thing be on the crossing, it would consume from five to ten minutes for each crossing, dependent, of course, upon the weight and length of the train, and the grade; but it would make an average of seven or eight minutes. We wish to show that this train was made up and known as No. 39, the vestibule train which runs from the City of Washington, through the States of Virginia, North Carolina, South Carolina and Georgia; that it was carrying passengers from one state to another; also carrying an express car with freight in it, from one state to another. We wish and expect to show that obedience to that Crossing Act would hinder and practically prevent interstate business being done by the defendant railway. We wish to show the condition- I have just stated all existed at the time this accident occurred on the 11th of October, 1903.

By the COURT: The testimony will be excluded and you may have an exception noted to this ruling."

Paragraph X.

Because the Court erred in instructing the jury, as follows:

"Under the Statute of Georgia, gentlemen, which has been referred to, it is the duties of the engineer of trains in Georgia, when approaching a crossing to blow the whistle, as has been stated to you by counsel, to check and keep checking their trains as they approach the crossing so as to be able to stop them, if any person or thing should be upon the crossing; that is the statute of the state, and it is entirely clear, that they were not doing that in this case; so, there is no question that the railroad company through its servants, agents and employees was guilty of negligence.

I therefore instruct you as a matter of law that the defendant through its servants, agents and employees was guilty of negligence.

The error being in effect the Court instructed the jury that
142 the statute therein mentioned was valid, whether it, in its operation, burdened or impeded the interstate traffic of the defendant company, or impaired the usefulness of such traffic or not.

Wherefore defendant prays that these grounds be certified and new trial granted.

JNO. J. STRICKLAND AND
THOS. F. GREEN,
Att'ys for Movant.

I certify that the statement of facts of the foregoing motion are true.

It is ordered that the amendment be allowed as a part of the motion.

WM. T. NEWMAN,
U. S. Judge.

On said motion being argued by counsel for and against the same respectively, the presiding Judge announced that he would sustain the motion unless plaintiff would write off two thousand dollars from their verdict, which if they did he would overrule the same; whereupon the plaintiff wrote off the $2,000.00 and the Judge passed an order overruling the motion and refusing the new trial. For as much as the foregoing facts and decisions do not appear of record in said cause, the defendant, the So. Ry. Co., during the same term of the Court at which said cause was finally disposed of, on motion for new trial, and within the time allowed by law, and under the rules of the Court, presents this its bill of exceptions, and prays that the same be signed, certified, filed and made a part of the record of the Court in this case.

JNO. J. STRICKLAND,
Att'ys for the So. Ry. Co.

I certify that the foregoing bill of exceptions is true and contains all of the evidence and rulings and decision of the Court material to a clear understanding of the errors complained of, and the clerk of said Court is hereby ordered to file the same as part of the record of said case.

This November 17th, 1906.

WM. T. NEWMAN,
U. S. Judge.

Filing: U. S. Circuit Court. Filed in clerk's office, Nov. 17th, 1906. O. C. Fuller, Clerk.

143 Due and legal service of the foregoing bill of exceptions acknowledged, and all further service waived.

This November 17th, 1906.

REUBEN R. ARNOLD,
HOWARD THOMPSON,
Att'ys for Def't in Error.

Filing: U. S. Circuit Court. Filed in clerk's office, Nov. 17, 1906. O. C. Fuller, Clerk.

144 *Clerk's Certificate.*

United States of America, Fifth Judicial Circuit, Eastern Division of the Northern District of Georgia.

I, Olin C. Fuller, clerk of the Circuit Court of the United States, for the Eastern Division of the Northern District of Georgia, do hereby certify that the foregoing and attached 161 pages contain a true copy of the record, bill of exceptions, assignment of errors and all the proceedings had in the cause entitled Inez King, by next friend, Mrs. Josephine King, versus Southern Railway Company, as the same appears on file and of record in the Clerk's office of the said Court, except that the original writ of error and the original citation *and* included in the stead of copies.

Witness my hand officially and the seal of the said Court, this the 6th day of December, A. D. 1906.

[SEAL.] OLIN C. FULLER, *Clerk.*

145 United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Lednum, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing printed record of 144 pages, in the case of

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
against
INEZ KING, by Next Friend, MRS. JOSEPHINE KING,

numbered 1635 was printed under my supervision, and is identical with the printed records upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 14th day of April, A. D. 1908.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals.

146 Pleas and proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the first Monday in October, A. D. 1907, at Atlanta, Georgia, and on the third Monday in November, A. D. 1907, at New Orleans, Louisiana, before the Honorable Don A. Pardee, and the Honorable David D. Shelby, Circuit Judges, and the Honorable Waller T. Burns, District Judge.

Be It Remembered, That heretofore, to-wit: on the 11th day of January, A. D. 1907, a transcript of record, pursuant to a writ of error to the Circuit Court of the United States for the Northern District of Georgia, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, wherein Southern Railway Company is plaintiff in error and Inez King, by Next Friend, Mrs. Josephine King, is defendant in error, which said transcript of record was filed and docketed in said Circuit Court of Appeals as No. 1635.

That thereafter the following proceedings were had in said cause in said Circuit Court of Appeals, viz:

Argument and Submission.

No. 1635.

THE SOUTHERN RAILWAY CO.
vs.
INEZ KING.

OCT. 8, 1907.

On this day this cause was regularly called, and after argument

by Jno. J. Strickland, Esq., for plaintiff in error, and Harvey Hill, Esq., for defendant in error, was submitted to the Court.

And thereafter on March 3rd, 1908, an opinion of said Circuit Court of Appeals was filed in said cause in words and figures following, to-wit:

147 *Opinion.*

Filed 3 day of March, 1908.

CHARLES H. LEDNUM,
Clerk of the United States
Circuit Court of Appeals.

United States Circuit Court of Appeals, Fifth Circuit.

No. 1634.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
MRS. JOSEPHINE KING, Defendant in Error.

No. 1635.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
INEZ KING, Defendant in Error.

Writ of Error to the United States Circuit Court for the Northern District of Georgia.

Before Judges Pardee and Shelby, Circuit Judges; Burns, District Judge.

BURNS, District Judge, delivered the opinion:

These suits were brought in the Superior Court of Habersham County, State of Georgia, against the Southern Railway Company and were removed by the latter to the United States Circuit Court.

Mrs. King sought recovery for the death of her husband, and Inez, a minor, sued by next friend for personal injuries which she had sustained.

The grounds of negligence set out in both petitions are practically the same. Mrs. King alleging that on the day of the accident, "Your petitioner, her daughter, Inez, about 14 years old and her husband A. O. King, were in a buggy drawn by a mule, traveling on a public road, and while crossing the track of said railway at what is known as the 'Wade crossing,' the vehicle was struck by the locomotive. That in the approach to said crossing the track was obscured by trees, brushes and a high bank; that the approaching train was not discovered until they were upon the track; that the speed of the train was fifty miles an hour; that the death of A. O. King
148 and the injuries received by petitioners were due to the neg-

ligent manner in which the train was operated, the high rate of speed, and failure to give any warning. The petitions further aver that "the defendant's agents failed to blow the whistle at the blow-post; and failed to simultaneously check and keep checking the speed of said train as it approached said crossing, so as to stop in time, should any person or thing be crossing said track."

The defendant, the railway company, filed its answer denying each and every paragraph of plaintiff's petition and thereafter with leave of Court pleaded by amendment that at the time of the accident for many years prior thereto and now the defendant operates and controls a line of railway from the City of Washington, D. C., through the States of Virginia, North and South Carolina, into and through Georgia; that said railway forms a continuous line under the Act of Congress, for the purpose of facilitating commerce among the several States, and the postal and military communications of the United States, and to that end for the purpose of carrying passengers, freight, mails, troops and supplies from one State into another. That said train was a through train, made up in the City of Washington, carrying mail, express and passengers from one State into another, and doing an interstate business, under the authority and control of the Congress of the United States. That the statute of Georgia providing that "there must be fixed on the line of said road, at the distance of 400 yards from the center of each of said crossings and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts to blow the whistle of the locomotive until it arrives at the public crossing, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road," is inoperative as to defendant's trains, for that, it is in violation of Sec. 8, Article 1 of the Constitution of the United States, which gives to Congress the right to "regulate commerce with foreign nations and among the several States." That said statute is not a reasonable regulation of the police power, but a direct burden upon and impediment to interstate traffic and impairs the usefulness of defendant for the conduct of such business. That it is impossible to observe said statute and carry the mails under the contract which defendant has with the Government, and the observance of said statute renders it impossible to do an interstate business.

Mrs. King about the same time, filed suit in Habersham County seeking compensation for the injuries to her person and the amount claimed as damages not being within the jurisdiction of the said Federal Court, trial was had in the Superior Court of said
149 county, resulting in a verdict for one thousand dollars. On appeal the judgment was affirmed by the Supreme Court of the State of Georgia. (See King vs. Ry. Co., Vol. 55, S. E. R., page 965; 128 Ga., p. 383.) Upon motion and agreement of counsel, an order was entered consolidating the two causes of the mother and daughter, resulting in verdicts for the plaintiffs below, from which, and the judgments thereon, assignments of error are presented for review.

The records are identical in both cases with the exception that the

railway company filed in the trial Court a plea in bar, against the petition of Mrs. King upon the ground that plaintiff having recovered in the State Court for damages to her person, is now estoppel from maintaining the present action for the death of her husband. The contention is made that the injuries to the person of the wife, and the loss occasioned by the death of the husband, constitute a single cause of action and that separate actions will not lie. This contention appears to be seriously made, but in the practice and procedure of the several States it would appear to be a legal novelty without law or precedent. If it be conceded that the deceased husband was the "personal property" of the plaintiff herein, then the contention would be supported by the decisions of every State Court, but one.

Where injuries to the person and the physical property of the injured party, grow out of a single tort, then, and in that event, the tort to the person and the property constitutes a single cause of action, and as previously suggested, the same should be presented in a single suit. This is the English view and the holding is the same in all of the American Courts with one exception. The declaration that the husband is the "personal property" of the wife had not, as yet, received the sanction of Court or text writer. The rule as to a single cause of action has no application where the injury is suffered in a different capacity, or by different persons. In such cases there is, of necessity, two causes of action and when embraced in a single suit, a plea of misjoinder would be applicable. Damages recovered by the surviving wife for injuries to her person became her separate property. Whereas in many States, and especially in Georgia, the recovery for the death of the husband becomes a trust fund for the benefit of the heirs of the deceased.

It follows, that the error complained of, by reason of the Court overruling said plea, is without merit. Any other disposition would have been error.

150 The following instruction is assigned as error:

"I further charge you that the care to be exercised by the said A. O. King in approaching the crossing and railroad track is that care which an ordinarily prudent person would exercise for his own safety. What would, or would not, amount to negligence in the manner upon which a person entered upon a railroad track, would depend, to a large extent, upon the peculiar location of the place at which he went upon the track. An ordinarily prudent person in the possession of all his faculties would not attempt to cross a railroad track at any place without using at least his sense of sight, if not that of hearing, to determine whether, at the time and place he was about to cross the same, there were present any of those dangers which a person of ordinary intelligence would reasonably apprehend."

This charge was given at the request of the defendant, with this exception, that the Judge substituted the word "should" for "would" where it occurs in the last paragraph of the charge and plaintiff in error contends that it changed the whole force of the charge. This assignment can not be sustained. Instructing the jury that the care

required is such that an ordinarily prudent person " 'would' exercise" is equivalent to saying " 'should' exercise" import the words would and should import the same meaning, and the best authorities use them interchangeably.

Blythe vs. Birmingham Water Works, 11 Exch. 781.
Words & Phrases, Vol. 8, page 1527.

The action of the trial Court in sustaining a demurrer to so much of defendant's answer, setting up, by amendment, the statute of Georgia governing trains in approaching a public road crossing, known as "the blow post and checking act," is assigned as error and particularly the ruling as to the second clause thereof which requires the engineer to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road." This legislative act appears in the statement and is known as Section 2222 of the Civil Code (1895) and was formerly Section 708 Civil Code (1882).

The brief and argument of the plaintiff in error largely rests the disposition to be made here upon this assignment. An examination of the act complained against, and its construction by the
151 Courts of Georgia, will relieve it from the suggestion that it was enacted for the purpose of regulating interstate commerce.

This statute was passed January 22nd, 1852 (Acts. 1852, p. 8), and became effective on the first of February thereafter. The original act provided that blow-posts should be erected at a distance of 200 yards from each public road crossing and a sign at the crossing in large letters with the warning: "When you hear the whistle blow look out for the engine." As amended, the distance of the blow-post is 400 yards and the warning sign has been eliminated. This enactment resulted from an accident to Mrs. Winn, her children and driver, which occurred at a public road crossing on the line of the Macon & Western Railway on December 14th, 1851, resulting in the death of two of the children and the driver, and serious injuries to Mrs. Winn and one child, the limbs of the former being broken and the skull of the latter fractured. The catastrophe was of such a serious nature that the General Assembly, then in session, promptly passed the act above referred to. This accident was the foundation of the cases of Davis and Winn, reported in 18 Ga. 679; 19 Ga. 440; 26 Ga. 250.

It being conceded, or rather found as a fact by this Court, that the legislative intent was to protect travelers and others in the use of the public highways of Georgia and not to regulate interstate traffic, it is still permissible, and ordinarily a matter of duty, to inquire what effect the statute has upon trains engaged in interstate commerce, for the reason that the intent may be waived, or dismissed, and still the Courts are not relieved from the necessity of ascertaining the practical effect of a particular act, for if it be conceded that the Legislature of a State is inhibited from passing any law which has the effect of regulating that which was directly committed to the Nation in the adoption of the Constitution, it follows, that duty would not be performed. short of the declaration, that such legislation is beyond the scope and

power of the State. The authorities supporting this proposition, may be found in Gibbons vs. Ogden, 9 Wh., p. 1, decided as early as 1824, the opinion being by Chief Justice Marshall, and in all subsequent cases where the question was at issue and particularly the case of Hennington vs. Georgia, 163 U. S. 299, where the earlier decisions are reviewed. If the act under discussion is but the reasonable exercise of the police power of the State, though it may effect and tend, in a measure, to regulate interstate commerce, it would not be obnoxious, nor a subject for inquiry by this Court, until such
152 time as the Congress may enact legislation covering this particular question. It appears to have been passed for the sole purpose of protecting those who may use public highways and presumably has its classification under the police power relating to the public safety. It may be contended however that the safety of the public is so remotely involved that the effect of the enactment is unreasonable and places an undue burden upon the carrier. While this Act in regard to its effect upon interstate commerce has never been presented to the Supreme Court of Georgia, as appears from an examination of the reports of that State from Vols. 18 to 128, the statute has frequently been construed in regard to local action and uniformly upheld, though the Supreme Court of that State has seen proper to subject it to criticism.

In affirming the judgment in Central of Georgia Railway Company vs. Hall, 34 S. E. 605, the Supreme Court makes the following observations concerning Section 2222 of the Georgia Code:

"We agree with the learned counsel that this law which requires trains to check, and keep checking when approaching crossings is a hard one, and that it is impossible for the railroads of the country to transact the business of the country and obey it. It was passed about 50 years ago, before the people appreciated the necessity of rapid transit in travel and in freight. If the law was duly obeyed by the locomotive engineers, I am informed that it would take 12 hours or more to run a passenger train from Atlanta to Macon, a distance of about 100 miles; still it is the law of the land and the Courts must enforce it, however hard it may work upon the business interests of the country, if it should be observed, or upon the railroads when they violated it."

Where the servants of the railroad company fail to observe it and any person or property is injured upon the crossing, the company can make no defense, except that the injury was done by the consent of the person injured, or that he could have avoided the injury by the observance of ordinary care, or that his negligence contributed to it — the way of mitigation of damages."

In Bowen vs. Gainesville, etc., Ry. Co., 22 S. E., p. 695, Mch. 25, 1895, the Supreme Court referring to the requirement to check, say, "that requirement has frequently been construed to mean must have his train under such control, that he can bring it to a complete
153 stop, if necessary, to prevent a collision upon the track itself, and should it be strictly obeyed, a collision of any sort would be rendered impossible and there would be no necessity whatever for any warning of the approach of the train by the blowing of the whistle."

The question of the validity of State statutes and orders of State Railroad Commissions directing the stoppage of through interstate trains have frequently, within late years, been before the Supreme Court of the United States. One of the recent cases is that of Mississippi Railroad Commission vs. Illinois Central, 203 U. S. 335, and Atlantic Coast Line Railroad vs. North Carolina Commission, 206 U. S. 1. The last declaration by the Supreme Court is found in the opinion rendered Dec. 9, 1907, in Atlantic Coast Line Railroad vs. South Carolina Commission, in which Mr. Justice Peckham speaking for that tribunal uses the following language:

"That any exercise of State authority in whatever form manifested, which directly regulates interstate commerce is repugnant to the commerce clause of the Constitution, is obvious. It hence arises that any command of a State, whether made directly or through the instrumentality of a railroad commission, which orders, or the necessary effect of which is to order, the stopping of an interstate train at a named station or stations, if it directly regulates interstate commerce, is void."

In Gladson vs. Minnesota, 166 U. S. 430, it was said:

"The principles of law which govern this case are familiar, and have been often affirmed by this Court. A railroad corporation created by a State is for all purposes of local government a domestic corporation and its railroad within the State is a matter of domestic concern. Even when its road connects, as most railroads do, with railroads in other States, the State which created the corporation may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. It may prescribe the location and the plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience and comfort of the passengers and of the public. All such regulations are strictly within the
154 police power of the State. They are not in themselves regulations of interstate commerce; and it is only when they operate as such in the circumstances of their application, and conflict with the express or presumed will of Congress exerted upon the same subject, that they can be required to give way to the paramount authority of the Constitution of the United States. Stone vs. Farmers' Loan & Trust Co., 116 U. S. 307, 333, 334; Smith vs. Alabama, 124 U. S. 465, 481, 482; Hennington vs. Georgia, 163 U. S. 299, 308, 317; New York, New Haven & Hartford Railroad vs. New York, 165 U. S. 628, 632."

The majority of the Court are of opinion that Gladson vs. Minnesota, supra, and authorities therein cited, sustain the constitutionality of the statute; that the same is a valid exercise of the police power of the State, and, therefore, the trial Court did not err in sustaining the demurrer to the amended answer.

The writer entertains the view that the statute is valid in so far as domestic corporations are concerned; but unreasonable and void as to trains engaged in interstate commerce.

The business of the country must go on and in the language of the

Supreme Court of Georgia, in Central Railway vs. Hall, supra, "It is impossible for the railroads to transact the business of the country and obey it."

Any exercise of State authority in whatever form manifested, which directly regulates, or the necessary effect of which is to regulate interstate commerce is void. Atlantic, etc., Ry. vs. South Carolina, supra.

Plaintiff in error excepted to the ruling of the Court in excluding the testimony of Ben Dewberry, in charge of the engine at the time of the collision, in that said witness being called to testify in behalf of the defendant below, in response to a question from counsel, answered: "There are between 90 and 100 crossings on the Southern Railway between the South Carolina line and Atlanta." The question was objected to because incompetent, immaterial and inadmissible with the observation by counsel: "I think the entire case should be confined to this crossing." Counsel for defendant stated, "I expect to prove that between the South Carolina line and Atlanta, there are practically 100 road crossing-, or between 85 and 100 public road crossings; that the distance is 101 miles; that the crossings in some localities are very close together, and within a few hundred yards of each other, and at others further apart; the average making about a crossing to the mile almost;" we expect to show further, that
155 to observe the statute, and check and keep checking, so as to have the train under control, and to stop, should any person or thing be on the crossing, would consume from 5 to 10 minutes at each crossing, depending upon the weight and length of train and grade. We wish to show that this train was made up and known as No. 39 vestibule train, which runs from the City of Washington through the States of Virginia, North and South Carolina and Georgia; that it was carrying passengers from one State to another, and also carried an express car with freight. We expect to show that obedience to that crossing Act would hinder and practically prevent interstate business being done by the defendant." The objection was sustained, testimony excluded, and exception noted. We are of the opinion that there was no error in the action of the Court in sustaining the objection, as the testimony was not properly admissible in the absence of pleading to support it. This view seems to have obtained with counsel for defendant below, as evidenced by the amendment filed and heretofore discussed.

Pleadings of the parties are the allegations made by the parties to a civil, or criminal, case for the purpose of definitely fixing and presenting the issues to be tried and determined between them; and the facts from which the law draws the conclusion of non-liability, must be pleaded in the answer, where they are not stated in the petition.

Under Section 914 of the Revised Statutes of the United States, it is provided that the practice, pleadings, forms and modes of proceeding in civil causes, other than equity and admiralty, in the Circuit and District Courts shall conform, as near as may be, to the practice, pleadings, forms and modes of proceeding existing in like causes in the Courts of record of the State in which such Circuit and District Courts are held.

The only object, and the avowed purpose of tendering this testi-

mony, was to show the invalidity of the statute in so far as it related to trains engaged in interstate traffic, and this without special plea, would not be permissible under the practice and pleadings obtaining in Georgia. See Parham & Co. vs. Potts-Thompson Liquor Co., 56 S. E. 460, and cases there cited.

The validity, or invalidity of a statute, can not be considered upon appeal, unless the record shows that the question was distinctly raised in the pleadings in the Court below.

Savannah, etc., Ry. Co. vs. Hardin, 35 S. E. 68-L.

156 A subsequent assignment complains of the refusal to direct a verdict for the defendant. The evidence was sharply in conflict and the charge requested would have invaded the province of the jury.

The last assignment seeks to review the following paragraph of the general charge to the jury:

"Under the statutes of Georgia, gentlemen, which have been referred to, it is the duty of engineers of trains in Georgia when approaching a crossing, to blow the whistle, as stated to you by counsel, and to check, and keep checking their trains as they approach the crossing, so as to be able to stop them if any person or thing should be upon the crossing. That is the statute of this State, and it is entirely clear that they were not doing that in this case; so there is no question that the railway company, through its servants and agents, was guilty of negligence. I, therefore, instruct you as a matter of law, that the defendant through its servants, agents and employees was guilty of negligence."

This point is reserved, but the brief contains neither authority nor argument in support of the proposition. The failure to comply with a State statute is held to be negligence per se in Georgia and many other jurisdictions. The engineer testified that he sounded the whistle at the blow-post, 400 yards from the crossing, but did not continue to blow until the crossing was reached, and made "no effort to comply with the statute in any other particular," and only attempted to check his train when he realized the danger of collision. The object of blowing the whistle is to give timely warning of the approach of the train. It follows that, if a person about to go upon the crossing, sees, hears, or otherwise knows of the approach of the train in time to avoid injury, the object of the statute has been accomplished, and in that event failure to give the statutory warning would not be negligence. This view occurred to the trial Court, and the record discloses that upon this point the jury was charged:

"If by the exercise of ordinary care and prudence the deceased could have ascertained by the use of his sense of hearing, and of sight, that the train was approaching, and thereby avoided the accident, his widow can not recover in this action."

And further:

157 "If you believe that King drove on the crossing without having stopped and listened, and if he had listened he would have heard the approach of the train in time to have avoided the injury, then, I charge you that his widow cannot recover."

If the charge is error, which we do not concede, it is rendered harmless by the further charge, to-wit:

"Notwithstanding the negligence of the defendant (in failing to comply with the statute) if the deceased, by the exercise of ordinary care could have avoided the consequences of defendant's negligence, his widow can not recover."

The same rule was applied to the daughter, with the exception that the negligence of the father, if any, could not be attributed to her.

Upon the whole case, as made by the pleadings and testimony, the law was clearly presented, the assignments disclose no error, and the judgments should be in all things affirmed.

And thereafter on the 3rd day of March, 1908, in the record of the proceedings of said Circuit Court of Appeals is a judgment in said cause in the words and figures following, to-wit:

Final Judgment.

No. 1635.

SOUTHERN RAILWAY COMPANY
vs.
INEZ KING, by Next Friend.

MARCH 3, 1908.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of Georgia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the plaintiff in error, Southern Railway Company, and the surety on the writ of error bond herein, J. W. English, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of said Circuit Court.

158 I, Charles H. Lednum, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the 12 pages next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the Court (except the transcript of the record from the Circuit Court of the United States for the Northern District of Georgia) in a certain cause in said Court, numbered 1635, wherein Southern Railway Company is plaintiff in error, and Inez King, by Next Friend, Mrs. Josephine King, is defendant in error, as full, true and complete as the originals of the same now remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 14th day of April, A. D. 1908.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals.

159 In the United States Circuit Court of Appeals for the Fifth Circuit.

THE SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
versus
INEZ KING, by Next Friend, etc., Defendant in Error.

It is hereby stipulated by and between the plaintiff in error and defendant in error, that the certified transcript of the record of the proceedings in the United States Circuit Court of Appeals for the Fifth Circuit, filed in the Supreme Court of the United States by petitioner at the time of the filing of its petition for a writ of certiorari, may be taken as a return to the writ of certiorari issued out of the Supreme Court in said cause and the filing of a further certified transcript is hereby waived.

JNO. J. STRICKLAND,
Attorney for Plaintiff in Error.
REUBEN R. ARNOLD,
Attorney for Defendant in Error.

Endorsements: No. 1635. Southern Railway Co. vs. Inez King, by next friend, &c. Stipulation as to return to certiorari. U. S. Circuit Court of Appeals. Filed Jul- 20, 1908, Charles H. Lednum, Clerk.

A true copy.
Attest with seal this 20th day of July, 1908.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM, *Clerk.*

160 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Southern Railway Company is plaintiff in error, and Inez King, by her next friend Mrs. Josephine King, is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the Northern District of Georgia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Su-
161 preme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of May, in the year of our Lord one thousand nine hundred and eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

162 [Endorsed:] File No. 21,140. Supreme Court of the United States. No. 737, October Term, 1907. Southern Railway Company vs. Inez King, by her next friend, &c. Writ of Certiorari. Filed 20 day of July, 1908. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

In the United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Lednum, Clerk of said Court, do hereby certify that I received the within writ on the 20th day of July, A. D. 1908, and whereas, the attorneys for the parties therein named have, by a stipulation in writing filed in my office on this day, agreed that the certified transcript of the record of the proceedings in the United States Circuit Court of Appeals filed in the Supreme Court of the United States, by petitioner, at the time of the filing of its petition for certiorari, can be taken as a return to the writ of certiorari issued by the Supreme Court, and the filing of a further certified transcript is hereby waived. Therefore, in compliance with said writ, and by direction of the Judges of this court, I have made and attached hereto a certified copy of said stipulation as a return to the within writ.

Witness my official signature and the seal of said Court this the 20th day of July, A. D. 1908.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM, *Clerk.*

163 [Endorsed:] File No. 21,140. Supreme Court U. S. October Term, 1909. Term No. 141. Southern Railway Co., Petitioner, vs. Inez King, by her next friend, &c. Writ of Certiorari & return. Filed July 23d, 1908.

PETITION FOR CERTIORARI.

IN THE SUPREME COURT OF THE UNITED STATES.

SOUTHERN RAILWAY COMPANY,
Petitioner,
vs.
INEZ KING, by next friend,
Respondent.

To the HONORABLE The CHIEF JUSTICE and ASSOCIATE JUSTICES of THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner the SOUTHERN RAILWAY COMPANY, respectfully represents that INEZ KING, by next friend, brought her suit in Habersham Superior Court against the SOUTHERN RAILWAY COMPANY for the alleged personal injury she received at a public crossing. Said case was regularly removed into the United States Circuit Court for the Eastern Division of the Northern District of Georgia. In addition to the general answer filed, your petitioner filed an amended answer under the order of the Court in words as follows:

(Answer on page 28 of the Record, 635).

"Now comes the Southern Railway Company, the defendant in the above stated case, and by permission of the Court first obtained, amends its answer already filed, and says plaintiff should not recover in this case, for the following additional reasons:

PARAGRAPH XI.

At the time plaintiff alleges she was injured and for many years prior thereto, and now, defendant controls and operates a line of railroad from the City of Washington, D. C., through the States of Virgnia, North Carolina, South Carolina, and into

and through Georgia; said line forming a continuous line of railroad, the same having been formed under the Act of Congress, for the purpose of facilitating commerce among the several states, and the postal and military communications of the United States, and to that end for the purpose of carrying passengers, freight, government mails, troops and supplies from one state into another.

PARAGRAPH XII.

Defendant further shows that the train which plaintiff alleges injured her was a through train made up in the City of Washington, D. C., carrying U. S. Mail, and an express car of merchandise, and passenger coaches with passengers going from one state into another; and this defendant by said train was doing an inter-state business, under the authority and control of the Congress of the United States.

PARAGRAPH XIII.

Defendant further shows that the statute of Georgia, which is in these words, to-wit:

"There must be fixed on the line of said road, at the distance of 400 yards from the center of each of said crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof so as to stop in time should any person or thing be crossing said track on said road," the violation of which plaintiff alleges as the negligence in this case is and was inopperative as to defendant's train, which plaintiff alleges injured her, for the reason that it is in violation of Section 8, Article First, of the Constitution of the U. S., which gives to Congress the right to

"regulate commerce with foreign nations, and among the several states and with the Indian Tribes."

PARAGRAPH XIV.

Your defendant further shows that the Statute of Georgia is not a reasonable regulation of the police power of the state to secure the safety of persons, but that the statute is a direct burden on and impedes the inter-state traffic being done by this defendant, and impairs the usefulness of its facilities for such traffic.

PARAGRAPH XV.

Defendant further shows that it is impossible to observe said statute and carry the mails as defendant is required to carry them under the contract it has with the government; and it is likewise impossible to do an inter-state business, and at the same time comply with the terms of said statute.

Wherefore, it says that said statute is inoperative as to it, and it should not be required to comply with the same on its inter-state line of railroad.

All which it stands ready to verify and prays that it be hence discharged with its reasonable cost."

The plaintiff below demurred to this amendment upon the ground that the same did not set up a defense good in law. After argument the Hon. W. T. NEWMAN, Judge, presiding, sustained the demurrer and struck the amendment. The case then went to trial.

During the progress of the case Ben Dewberry, an Engineer of the Company was a witness on the stand and the following occurred:

"BEN DEWBERRY, stated that:

"There are between ninety and one-hundred crossings on the

Southern Railway, between the South Carolina line and Atlanta."

"Plaintiff's counsel said:

'I object to that question and to the answer, because incompetent, immaterial and inadmissible. I think the entire case should be confined to this crossing.'

"Counsel for defendant then stated:

'I expect to prove that between the South Carolina line and Atlanta, there are practically one-hundred road crossings, or between eighty-five and one-hundred public road crossings; that the distance is one-hundred and one miles; that the crossings in some localities are very close together, and within a few hundred yards of each other, and at others farther apart, but on the average making a crossing to the mile almost. We expect to show further, that to observe the statute and check and keep checking so as to have a train under control, and to stop should any person or thing be on the crossing it would consume from five to ten minutes for each crossing dependent, of course, upon the weight and length of the train, and the grade; but it would make an average of seven or eight minutes. We wish to show that this train was made up and known as No. 39, the vestibule train which runs from the City of Washington, through the States of Virginia, North Carolina, South Carolina and Georgia; that it was carrying passengers from one state to another, also carrying an express car with freight on it, from one state to another. We wish and expect to show that obedience to that Crossing Act would hinder, and practically prevent inter-state business being done by the defendant railroad. We wish to show the condition I have just stated all existed at the time this accident occurred, on the 11th of October, 1903.'"

"By the Court:

'The testimony will be excluded, and you may have an exception noted to this ruling.'"

A verdict was rendered for the plaintiff below. Motion for New Trial was made and overruled, and the case then carried to the United States Circuit Court of Appeals, being No. 1635 of the Fifth Circuit.

On the 3d day of March, 1908, the United States Circuit Court of Appeals handed down an opinion affirming the judgment of the Court below; all of the Justices of said Court agreeing upon all the propositions in the case, except the demurrer to the amended answer above set forth, and as to this proposition two of the Justices only assenting to the opinion, the other expressing a different view. A copy of said opinion as rendered is as follows:

UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH CIRCUIT.

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error.
vs.
MRS. JOSEPHINE KING,
Defendant in Error.
No. 1634.

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error.
vs.
INEZ KING, by next friend,
Defendant in Error
No. 1635.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

Before Judges Pardee and Shelby, Circuit Judge, Burns, District Judge. Burns, District Judge delivered the opinion.

These suits were brought in the Superior Court of Habersham County, State of Georgia against the Southern Railway Company and were removed by the latter to the United States Circuit Court.

Mrs. King sought recovery for the death of her husband, and Inez, a minor, sued by next friend for personal injuries which she had sustained.

The grounds of negligence set out in both petitions are practically the same. Mrs. King alleging that on the day of the accident, "Your petitioner, her daughter, Inez, about 14 years old and her husband A. O. King, were in a buggy drawn by a mule, traveling on a public road, and while crossing the track of said railway at what is known as the 'Wade crossing'

BLURRED

the vehicle was struck by the locomotive. That in the approach to said crossing the track was obscured by trees, brushes and a high bank; that the approaching train was not discovered until they were upon the track; that the speed of the train was fifty miles an hour; that the death of A. O. King and the injuries received by petitioners were due to the negligent manner in which the train was operated, the high rate of speed and failure to give any warning. The petitions further aver that "the defendants' agent failed to blow the whistle at the blow-post; and failed to simultaneously check and keep checking the speed of said train as it approached said crossing, so as to stop in time, should any person or thing be crossing said track."

The defendant, the Railway Company filed its answer denying each and every paragraph of plaintiff's petition and thereafter with leave of court pleaded by amendment that at the time of the accident for many years prior thereto and now the defendant operates and controls a line of railway from the City of Washington, D. C., through the States of Virginia, North and South Carolina, into and through Georgia; that said railway forms a continuous line under the Act of Congress, for the purpose of facilitating commerce among the several States, and the postal and military communications of the United States, and to that end for the purpose of carrying passengers, freight, mails, troops and supplies from one State into another. That said train was a through train made up in the City of Washington, carrying mail, express and passengers from one State into another, and doing an inter-state business, under the authority and control of the Congress of the United States. That the Statue of Georgia, providing that "there must

be fixed on the line of said road, at the distance of 400 yards from the center of each of said crosings and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts to blow the whistle of the locomotive until it arrives at the public crossing, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road," is inoperative as to defendants trains, for that, it is in violation of Sec. 8, Article 1 of the Constitution of the United States, which gives to congress the right to "regulate commerce with foreign nations and among the several States." That said statute is not a reasonable regulation of the police power, but a direct burden upon and impediment to inter-state traffic and impairs the usefulness of defendant for the conduct of such business. That it is impossible to observe said statute and carry the mails under the contract which defendant has with the Government, and the observance of said statute renders it impossible to do an inter-state business.

Mrs. King about the same time, filed suit in Habersham County seeking compensation for the injuries to her person and the amount claimed as damages not being within the purisdiction of the said Federal Court, trial was had in the Superior Court of said County, resulting in a verdict for one thousand dollars. On appeal the judgment was affirmed by the Supreme Court of the State of Georgia. (See King vs. Ry. Co., Vol. 55 R. R. page 965: 128 Ga. p. 383. Upon motion and agree ment of counsel, an order was entered consolidating the two causes of the mother and daughter, resulting in verdicts for the plaintiffs below, from which, and the judgments thereon, assignments of error are presented for review.

The records are identicl in both cases with the exception that the Railway Company filed in the trial court a plea in bar, against the petition of Mrs. King upon the ground that plaintiff having recovered in the State court for damages to her person, is now estopped from maintaining the present action for the death of her husband. The contention is made that the injuries to the person of the wife, and the loss occasioned by the death of the husband, constitute a single cause of action and that separate actions will not lie. This contention appears to be seriously made but in the practice and procedure of the several State it would appear to be a legal novelty without law or precedent. If it be conceded that the deceasd husband was the "person property"' of the plaintiff herein, then the contention would be supported by the decisions of every State court, but one.

Where injuries to the person and the physical property of the injured party, grow out of a single tort, then, and in that event, the tort to the person and the property constitutes a single cause of action, and as previously suggested, the same should be presented in a single suit. This is the English view and the holding is the same in all the American Courts with one exception. The declaration that the husband is the "personal property" of the wife had not, as yet, received the sanction of court or text writer. The rule as to a single cause of action has no application where the injury is suffered in a different capacity, or by different persons. In such cases there is, of necessity, two causes of action and when embraced in a a single suit, a plea of misjoinder would be applicable. Damages recovered by the surviving wife for injuries to her person became her separate property. Whereas in many States, and

especially in Georgia, the recovery for the death of the husband becomes a trust fund for the benefit of the heirs of the deceased.

It follows, that the error complained of, by reason of the court overruling said plea, is without merit. Any other disposition would have been error.

The following instruction is assigned as error:

"I further charge you that the care to be exercised by the said A. O. King in approaching the crossing and railroad track is that care which an ordinarily prudent person would exercise for his own safety. What would, or would not, amount to negligence in the manner upon which a person entered upon a railroad track, would depend, to a large extent, upon the peculiar location of the place at which he went upon the track. An ordinarily prudent person in the possession of all his faculties would not attempt to cross a railroad track at any place without using at least his sense of sight; if not that of hearing, to determine whether, at the time and place he was about to cross the same, there were present any of those dangers which a person of ordinary intelligence would reasonably apprehend."

This charge was given at the request of the defendant, with this exception, that the judge substituted the word "should" for "would" where it occurs in the last paragraph of the charge and plaintiff in error contends that it changed the whole force of the charge. This assignment can not be sustained. Instructing the Jury that the care required is such that an ordinarily prudent person "would" exercise" is equivalent to saying "should exercise" the words would and should import the same meaning, and the best authorities use them interchangeably.

Blythe vs. Birmingham Water Works, 11 Exch. 781

Words & Phrases, Vol. 8, page 1527.

The action of the trial court in sustaining a demurrer to so much of defendant's answer, setting up, by amendment, the

Statute of Georgia governing trains in approaching a public road crossing, known as "the blow-post and checking act," is assigned as error and particularly the ruling as to the second clause thereof which requires the Engineer to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road." This legislative act appears in the statement and is known as section 2222 of the Civil Code (1895), and was formerly section 708 Civil Code (1882).

The brief and argument of the plaintiff in error largely rests the disposition to be made here upon this assignment. An examination of the act complained against, and its construction by the courts of Georgia, will relieve it from the suggestion that it was enacted for the purpose of regulating interstate commerce.

This statute was passed January 22nd, 1852 (Acts 1852, p. 8) and became effective on the first of February thereafter. The original act provided that blow-posts should be erected at a distance of 200 yards from each public road crossing and a sign at the crossing in large letters with the warning: "when you hear the whistle blow look out for the engine." As amended, the distance of the blow-post is 400 yards and the warning sign has been eliminated. This enactment resulted from an accident to Mrs. Winn, her children and driver, which occurred at a public road crossing on the line of the Macon & Western Railway on December 14th, 1851, resulting in the death of two of the children and the driver, and serious injuries to Mrs. Winn and one child, the limbs of the former being broken and the skull of the latter fractured. The catastrophe was of such a serious nature, that the General Assem-

bly, then in session, promptly passed the act above referred to. This accident was the foundation of the cases of Davis and Winn, reported in 18 Ga. 679; 19 Ga. 440; 26 Ga. 250.

It being conceded, or rather found as a fact by this court, that the legislative intent was to protect travelers and others in the use of the public highways of Georgia and not to regulate inter-state traffic, it is still permissible, and ordinarily a matter of duty, to inquire what effect the statute has upon trains engaged in inter-state commerce, for the reason that the intent may be waived, or dismissed, and still the courts are not relieved from the necessity of ascertaining the practical effect of a particular act, for if it be conceded that the Legislature of a state is inhibited from passing any law which has the effect of regulating that which was directly committed to the Nation in the adoption of the Constitution, it follows, that duty would not be performed, short of the declaration, that such legislaion is beyond the scope and power of the State. The authorities supporting this proposition, may be found in Gibbons v. Ogden, 9 Wh. p. 1., decided as early as 1824, the opinion being by Chief Justice Marshall, and in all subsequent cases where the question was at issue and particularly the case of Hennington vs. Georgia 163 U. S. 299, where the earlier decisions are reviewed. If the act under discussion is but the reasonable exercise of the police power of the State, though it may effect and tend, in a measure, to regulate inter-state commerce, it would not be obnoxious nor a subject for inquiry by this court, until such time as the Congress may enact legislation covering this particular question. It appears to have been passed for the sole purpose of protecting those who may use public highways and presumably has its classification under the

police power relating to the public safety. It may be contended, however, that the safety of the public is so remotely involved that the effect of the enactment is unreasonable and places an undue budren upon the carrier. While this Act in regard to its effect upon inter-state commerce has never been presented to the Supreme Court of Georgia, as appears from an examination of the reports of that State from Vols. 18 to 128, the statute has frequently been construed in regard to local action, and uniformly uheld, though the Supreme Court of that State has seen proper to subject it to criticism.

In affirming the judgment in Central of Georgia Railway Company vs. Hall, 34 S. E. 605, the Supreme Court makes the following observations concerning section 2222 of the Georgia Code:

"We agree with the learned counsel that this law which requires trains to check, and keep checking when approaching crossing is a hard one, and that it is impossible for the railroads of the country to transact the business of the country and obey it. It was passed about 50 years ago, before the people appreciated the necessity of rapid transit in travel and in freight. If the law was duly obeyed by the locomotive engineers, I am informed that it would take 12 hours or more to run a passenger train from Atlanta to Macon, a distance of about 100 miles; still it is the law of the land and the courts must enforce it, however, hard it may work upon the business interests of the country, if it should be observed, or upon the railroads when they violated it."

Where the servants of the railroad company fail to observe it and any person or property is injured upon the crossing, the company can make no defense, except that the injury was done by the consent of the person injured, or that he could have avoided the injury by the observance of ordinary care, or that his negligence contributed to it in the way of mitigation of damages."

In Bowen vs. Gainesville et. Ry. Co. 22 S. E. p. 695, Mch. 25, 1895, the Supreme Court referring to the requirement to check, says that requirement has frequently been construed to mean must have his train under such control, that he can bring it to a complete stop, if necessary, to prevent a collision upon the track itself, and should it be strictly obeyed, a collision of any sort would be rendered impossible and there would be no necessity whatever for any warning of the approach of the train by the blowing of the whistle."

The question of the validity of State Statutes and orders of State railroad Commissions directing the stoppage of through inter-state trains have frequently, within late years, been before the Supreme Court of the United States. One of the recent cases is that of Mississippi Railroad Commission vs. Illinois Central 203 U. S. 335, and Atlantic Coast Line Railroad vs. North Carolina Commission, 206 U. S. 1. The last declaration by the Supreme Court is found in the opinion rendered Dec. 9, 1907 in Atlantic Coast Line Railroad vs. South Carolina Commission, in which Mr. Justice Peckham, speaking for that tribunal uses the following language:

"That any exercise of State authority in whatever form manifested, which directly regulates inter-state commerce is repugnant to the commerce clause of the Constitution, is obvious. It hence arises that any command of a State, whether made directly or through the instrumentality of a railroad commission, which orders, or the necessary effect of which is to order, the stopping of an inter-state train at a named station or stations, if it directly regulates interstate commerce, is void."

In Gladson v. Minnesota, 166 U. S. 430, it was said:

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"The principles of law which govern this case are familiar, and have been often affirmed by this court. A railroad corporation created by a State is for all purposes of local government a domestic corporation and its railroad within the State is a matter of domestic concern. Even when its road connects as most railroads do, with railroads in other States, the Staate which created the corporation may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. It may prescribe the location and the plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience and comfort of the passengers and of the public. All such regulations are strictly within the police power of the State. They are not in themselves regulations of inter-state commerce; and it is only when they operate as such in the circumstances of their application, and conflict with the express or presumed will of Congress exerted upon the same authority of the Constitution of the United States. Stone v. Farmers' Loan & Trust Co. 116 U. S. 307, 333, 334; Smith v. Alabama, 124 U. S. 465, 481, 482; Hennington v. Georgia, 163, U. S., 299, 308, 317; New York, New Haven & Hartford Railroad v. New York, 165 U. S. 628, 632."

The majority of the court are of opinion that Gladson v. Minnesota, supra, and authorities therein cited, sustain the constitutionality of the Statute; that the same is a valid exercise of the police power of the State, and therefore, the trial court did not err in sustaining the demurrer to the amended answer.

The writer entertains the view that the Statute is valid in so far as domestic corporations are concerned; but unreasonable and void as to trains engaged in inter-state commerce.

The business of the country must go on and in the language of the Supreme Court of Georgia, in Central Railway v. Hall, supra, "it is impossible for the railroads to transact the business of the country and obey it."

Any exercise of State authority in whatever form manifested, which directly regulates, or the necessary effect of which

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is to regulate interstate commerce is void. Atlantic, etc. Ry. v. South Carolina, supra.

Plaintiff in error excepted to the ruling of the court in excluding the testimony of Ben Dewberry, in charge of the engine at the time of the collision, in that said witness being called to testify in behalf of the defendant below, in response to a question from counsel, answered: "There are between 90 and 100 crossings on the Southern Railway between the South Carolina line and Atlanta." The question was objected to because incompetent, immaterial and inadmissible with the observation by counsel: "I think the entire case should be confined to this crossing." Counsel for defendant stated, "I expect to prove that between the South Carolina line and Atlanta, there are practically 100 road crossings, or between 85 and 100 public road crossings; that the distanc is 101 miles; that the crossings in some localities are very close together, and within a few hundred yards of each other, and of others further apart; the average making about a crossing to the mile almost"; we expect to show further, that to observe the statute, and check and keep checking, so as to have the train under control, and to stop, should any person or thing be on the crossing, would consume from 5 to 10 minutes at each crossing, depending upon the weight and length of train and grade. We wish to show that this train was made up and known as No. 39 vestibule train, which runs from the City of Washington through the States of Virginia, North and South Carolina and Georgia; that it was carrying passengers from one State to another, and also carried an express car with freight. We expect to show that obedience to that crossing Act would hinder and practically prevent inter-state business being done by the defendant."

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The objection was sustained, testimony excluded, and exception noted. We are of the opinion that there was no error in the action of the court in sustaining the objection, as the testimony was not properly admissible in the absence of pleading to support it. This view seems to have obtained with counsel for defendant below, as evidenced by the amendment filed and heretofore discussed.

Pleadings of the parties are the allegations made by the parties to a civil, or criminal case, for the purpose of definitely fixing and presenting the issues to be tried and determined between them; and the facts from which the law draws the conclusion of non-liability, must be pleaded in the answer, where they are not stated in the petition.

Under section 914 of the Revised Statutes of the United States, it is provided that the practice, pleadings, forms and modes of proceeding in civil causes, other than equity and admiralty, in the Circuit and District Courts shall conform, as near as may be, to the practice, pleadings, forms and modes of proceeding existing in like causes in the Courts of record of the State in which such Circuit and District Courts are held.

The only object, and the avowed purpose of tendering this testimony, was to show the invalidity of the statute in so far as it related to trains engaged in inter-state traffic, and this, without special plea, would not be permissible under the practice and pleadings obtaining in Georgia, See Parham & Co. vs. Potts-Thompson Liquor Co. 56 S. E. 460 and cases there cited.

The validity, or invalidity of a Statute, can not be considered upon appeal, unless the record shows that the question was distinctly raised in the pleadings in the Court below.

Savannah etc. Ry. Co. vs. Hardin, 35 S. E. 681.

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A subsequent assignment complains of the refusal to direct a verdict for the defendant. The evidence was sharply in conflict and the charge requested, would have invaded the province of the Jury.

The last assignment seeks to review the following paragraph of the general charge to the Jury:

"Under the statutes of Georgia, gentlemen, which have been referred to, it is the duty of engineers of trains in Georgia when approaching a crossing(to blow the whistle, as stated to you by counsel, and to check, and keep checking their trains as they approach the crossing, so as to be able to stop them if any person or thing should be upon the crossing. That is the statute of this State, and it is entirely clear that they were not doing that in this case; so there is no question that the railway company, through its servants and agents, was guilty of negligence. I, therefore, instruct you as a matter of law, that the defendant through its servants, agents and employees was guilty of negligence."

This point is reserved, but the brief contains neither authority nor argument in support of the proposition. The failure to comply with a state statute is held to be negligence per se in Georgia and many other jurisdictions. The engineer testified that he sounded the whistle at the blow-post, 400 yards from the crossing, but did not continue to blow until the crossing was reached, and made "no effort to comply with the statute in any other particular," and only attempted to check his train when he realized the danger of collision. The object of blowing the whistle is to give timely warning of the approach of the train. It follows that, if a person about to go upon the crossing, sees, hears, or otherwise knows of the approach of the train in time to avoid injury, the object of the statute has been accomplished, and in that event failure to give the statutory warning would not be negligence. This view occurred to the

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trial court, and the record discloses that upon this point the jury was charged:

"If by the exercise of ordinary care and prudence the deceased could have ascertained by the use of his sense of hearing, and of sight, that the train was approaching, and thereby avoided the accident, his widow can not recover in this action."

And further:

"If you believe that King drove on the crossing without having stopped and listened, and if he had listened he would have heard the approach of the train in time to have avoided the injury, then, I charge you that his widow can not recover."

If the charge is error, which we do not concede, it is rendered harmless by the further charge, to-wit:

"Notwithstanding the negligence of the defendant (in failing to comply with the statute) if the deceased, by the exercise of ordinary care could have avoided the consequences of defendant's negligence, his widow can not recover."

The same rule was applied to the daughter, with the exception that the negligence of the father, if any, could not be attributed to her.

Upon the whole case, as made by the pleadings and testimony, the law was clearly presented, the assignments disclose no error, and the judgments should be in all things affirmed."

Your petitioner shows that the enforcement of the Statute in Georgia known as the "Blow-Post Statute," set out above, is a direct burden upon its inter-state commerce operations; that the majority of the United States Court of Appeal, in the above decision, erred in holding that the enforcement of said Statute was not an enfringement of the inter-state commerce clause of the Federal Constitution.

Your petitioner further shows that the Federal question thus made is one of great importance; not only in the State of Georgia, but wherever inter-state carriers may be operated; that the principal therein contained is applicable to many thousand crossings in the State of Georgia, and would likewise be applicable throughout the entire United States; that the Federal question thus made arose after the case had been removed into the United States Circuit Court, and was passed on by the Circuit Court of Appeals.

Your petitioner believes that the aforesaid judgment of the Circuit Court of Appeals is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such case made and provided.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals, for the Fifth Circuit, commanding the said Court to certify and send to this Court, on a day certain, to be designated, a full and complete transcript of the record, and all proceedings of the said Circuit Court of Appeals in said case therein entitled SOUTHERN RAILWAY COMPANY, Plaintiff in Error, vs. INEZ KING, by next friend, Mrs. Josephine King, Defendant in Error, No. 1635, to the end that the said case may be reviewed and determined by this Court, as provided in Paragraph Sixth of the Act of Congress entitled an Act to Establish Circuit Courts of Appeal and to provide and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes, approved March 3, 1891; or that your petitioner may have such

other and further relief, or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act; and that the said judgment of the said Court of Appeals in the said case, and every part thereof may be reversed by this Honorable Court. Your petitioner presents herewith a Brief sustaining his application for certiorari, and likewise a certified copy of the transcript of record, including therein all the proceedings of the United States Circuit Court of Appeals; and your petitioner will ever pray, etc.

JNO. J. STRICKLAND,
Counsel for Petitioner.

STATE OF GEORGIA,
COUNTY OF CLARKE, } JNO. J. STRICKLAND being duly sworn says that he is one of the Counsel for the Southern Railway Company, the petitioner, that he prepared the foregoing petition, and that the allegations thereof are true, as he verily believes.

JNO. J. STRICKLAND.

Subscribed to and sworn before JNO. J. STRICKLAND. This 18th day of April, 1908.

My Commission expires Feb. 17, 1912.

ROY M. STRICKLAND,
N. P. Clarke County, Ga.

NOTICE OF APPLICATION
TO THE SUPREME COURT OF THE UNITED STATES
FOR WRIT OF CERTEIORARI.
UNITED STATES SUPREME COURT.

THE SOUTHERN RAILWAY COMPANY,
Petitioner,
vs.
INEZ KING, by next friend,
Respondent.

The respondent is hereby notified that the petitioner the SOUTHERN RAILWAY COMPANY, will, on Monday the ——— day of ——————— 1908, upon its verified petition, and a copy of the entire record in this case, at the opening of the Court, on that day or as soon thereafter as Counsel can be heard, submit a motion, a copy of which, and of the petition for writ of certiorari, and Brief in support thereof, are herewith delivered to you to the Supreme Court of the United States in its Court Room, at the Capitol in the City of Washington, D. C.

JNO. J. STRICKLAND,
Atty. for Petitioner, Southern Ry. Co.

The foregoing notice is hereby accepted and delivery of a copy thereof, and of the petition for writ of certiorari and Brief in support of the petition, are hereby acknowledged.

_____

Attorney for Respondent.

The 18th day of April, 1908.

THE SUPREME COURT OF THE UNITED STATES.

——————Term, 1908.

SOUTHERN RAILWAY COMPANY,
Petitioner,
vs.
INEZ KING, by next friend,
Respondent.

COMES NOW the SOUTHERN RAILWAY COMPANY, by JNO. J. STRICKLAND, Esq., its Counsel, and moves this Honorable Court that it shall, by certiorari, or other proper process directed to the Honorable the Justices of the United States Circuit Court of Appeals for the Fifth Circuit, require said Court to certify to this Court for its rievew and determination a certain case in said Court of Appeals, lately pending, wherein the respondent, INEZ KING, by next friend, was defendant in error, and your petitioner the SOUTHERN RAILWAY COMPANY, the plaintiff in Error, and to that end it now tenders herewith its petition, and Brief, with a certified copy of the entire record case in said Circuit Court of Appeals.

JNO. J. STRICKLAND,
Counsel.

UNITED STATES SUPREME COURT.

SOUTHERN RAILWAY COMPANY,
Petitioner,
vs.
INEZ KING, by next friend,

Error to the U. S. Circuit Court of Appeals.

BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

On the 29th of September, 1904, INEZ KING, by her next friend, Mrs. JOSEPHINE KING, filed in the Superior Court of Habersham County, her petition against the Southern Railway Company, in which she claimed Ffteen Thousand ($15,000.00) Dollars damage. She alleged that on the 11th of October, 1903, she and her mother, Josephine King and her father, A. O. King, were travelling in a buggy, and in crossing the Southern Railway Company's tracks at a public crossing she was struck by the engine of one of defendant's trains and seriously and permanently injured. She alleges that the injuries she sustained were due to the negligence of the defendant Railway Company in that the engineer of the train striking her, failed to check the train before reaching the crossing over which petitioner was passing as required by the statute of Georgia. The Railway Company, the defendant below, removed this case into the United States Circuit Court for the Eastern Division of the Northern District of Georgia. At the first term defendant filed a general answer to plaintiff's petition. On the 24th of April, 1906, defendant Railway Company filed an amendment to its former answer setting up that the

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Statute of Georgia requiring the defendant to check its trans at the public crossings was inapplicable to the defendant railway, because the same was an inter-state railway, and the Act was in violation of the Commerce clause of the Federal Constitution. This was demurred to upon the ground that it did not set up a legal defence, and the demurrer was sustained by the Honorable W. T. Newman, Judge presiding.

During the progress of the case Ben Dewberry, an Engineer of the Company was a witness on the stand and the following occurred:

"BEN DEWBERRY, stated that:

'There are between ninety-and one-hundred crossings on the Southern Railway, between the South Carolina line and Atlanta.'"

"Plaintiff's counsel said:

'I object to that question and to the answer, because incompetent, immaterial and inadmissible. I think the entire case should be confined to this crossing.'"

"Counsel for defendant then stated:

'I expect to prove that between the South Carolina line and Atlanta, there are practically one-hundred road crossings, or between eighty-five and one-hundred public road crossings; that the distance is one-hundred and one miles; that the crossings in some localities are very close together, and within a few hundred yeards of each other, and at others farther apart, but on the average making a crossing to the mile almost. We expect to show further, that to observe the statute and check and keep checking so as to have a train under control, and to stop should any person or thing be on the crossing it would consume from five to ten minutes for each crossing dependent,

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of course, upon the weight and length of the train, and the grade; but it would make an average of seven or eight minutes. We wish to show that this train was made up and known as No. 39, the vestibule train which runs from the City of Washington, through the States of Virginia, North Carolina, South Carolina and Georgia; that it was carrying passengers from one state to another, also carrying an express car with freight on it, from one state to another. We wish and expect to show that obedience to that Crossing Act would hinder, and practically prevent inter-state business being done by the defendant railroad. We wish to show the condition I have just stated all existed at the time this accident occurred, on the 11th of October, 1903.'"

"By the Court:

'The testimony will be excluded, and you may have an exception noted to this ruling.'"

SPECIFICATION OF ERRORS RELIED UPON.

The Plaintiff in Error relies upon the following errors:

I.

The Court erred in striking the amendment setting up that the Crossing Statute was inapplicable to an inter-state railroad.

II.

The Court erred in ruling out the evidence of Ben Dewberry.

The next question involved is whether or not the amendment seting up that the checking statute was inapplicable to an inter-state railroad was a good defense.

The Statute Section 2222 of the Civil Code of Ga., is as follows:

"There must be fixed on the line of said road, and at the distance of four hundred yards from the center of each of such road crossings, and on each side thereof, a post, and the engin-

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eer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road."

Section 2224 of the Code provides in part as follows:

"If any engineer neglects to blow said whistle as required and to check the speed as required, he is guilty of a misdemeanor," etc.

Plaintiff in error insisted below that the part of this statute requiring it to check was inoperative as to it, because plaintiff was an inter-state railroad, doing an inter-state business, including carrying the mail, and that this act was a burden upon its inter-state business, and in violation of the commerce clause of the Federal Constitution.

The demurrer to the plea admitted the allegations therein made, but insisted that it did not constitute a legal defense. I submit that the plea set up a legal defense and should not have been stricken on demurrer for the following reasons:

INTER-STATE COMMERCE COMMISSION.

1. The Federal Congress has provided for Inter-state Railroads: Revised Statute, Paragraph 5258 provides as follows:

"Every railroad company in the United States, whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and other property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of designation."

By the Act of Feb. 4, 1887, entitled: "An Act to Regulate Commerce", Congress created the Inter-state Commerce Commission, and enacted that the provisions of that Act should "apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad,

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or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment from one state or territory of the United States, or the District of Columbia, to any other State or territory of the United States * * * * and that it should be unlawful for any common carrier subject to the provisions of the Act, to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedules, carriages in different cars, or by other means or devices, the carriage of freight from being continuous from the place of shipment to the place of destination."

These Acts not only provided for interstate business, but likewise placed the same under the control of the Commerce Commission, and prevented them from entering into any contract which should have the effect to thwart the purposes of the interstate traffic. The interstate carrier is amenable to the Interstate Commission should it fail to discharge its duties as a carrier or to carry freight or passengers in a reasonable time and the State Commission has required freight to be moved a given number of miles per day and the carrier is liable both in penalty and damages for failure.

POLICE REGULATIONS.

2. It is insisted that the Statute under consideration is good because it is an exercise of the police power of the State. This police power has its limitations, and if it infringes the interstate commerce clause of course is void. It is not necessary that Congress should expressly enact a supervision over the interstate commerce, the Constitution itself provides for it.

Mr. Justice Field speaking for the Court in the case of

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Wellton v. Missouri, 91 U. S., 282, with reference to this question says:

"Non action by Congress is equivalent to a declaration that interstate commerce shall remain *free* and *untrammelled.*"

Does an Act of the Legislature of a State which requires that an inter-state railroad shall check its trains at each crossing to the extent that it cannot carry on its business, leaves inter-state commerce *free* and *untrammelled?* It is not good as police regulation unless it does.

Mr. Justice Gray, in the case of Ill. Cent. R. R. Co., vs. Ill., 163 U. S., page 154, in discussing what is a reasonable regulation by a State says:

"The State may make reasonable regulations to secure the safety of passengers, even on interstate trains, while within its borders. But the state can do nothing which will directly *burden* or *impede* the interstate traffic of the company, or *impair* the *usefulness* of its *facilities* for such traffic."

It was offered in evidence in this case to show that from the South Carolina line to Atlanta, Ga., there were about one-hundred crossings, and about one-hundred and one miles, or about a crossings to the mile; that a train observing the statute under consideration would lose from five to ten minutes at each crossing; that it would thus take hours to go from the State line to the City of Atlanta above its present schedule. Can it be said that such a statute will not *burden* or *impede* the interstate traffic of the Company, or that it will not *impair* the usefulness of its facilities for such traffic? Burden is defined: "To incumber with weight (literal or figurative); to law a heavy load upon, to load". Impede is defined: "To hinder; to stop in progress; to obstruct". Impair is defined: "To make worse; to diminish in quality, value, excellence or strength: to deteriorate".

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3. The Statute under consideration is peculiar to Georgia. I have found nothing like it anywhere else, nor have I been able to find an authority dealing directly with the question made.

Mr. Elliott in his work on Railroad, Vol. 2nd, paragraph 668, uses this language:

"The authorities are agreed that where the trains move upon or across highways their speed may be regulated, but there is a contrariety of opinion as to whether the speed of trains operating exclusively upon the private property of the company can be limited."

He cites as authority to support this text a number of State cases, but so far as I have been able to find they all have dealt with intra-railroads and the question at bar was not involved. A kindred question and the principle has been before the U. S. Supreme Court several times.

In the case of Ill. Central R. R. Co. vs. Ill., 163 U. S., page 154, it was held that an act of the State of Ill., requiring all trains to stop at the town of Cairo was an unreasonable exercise of police power of the State as applied to inter-state railroads.

In the case of Gladstone v. Minnesota; 166 U. S., page 431, it was held that the doctrine announced in the 163d U. S., above quoted was not applicable because the road in question was an Intra-state railroad.

In the case of Lake Shore & Michigan Ry. Co. vs. State of Ohio, reported in the 173d U. S., page 285, it was held that a statute requiring three trains each way to stop at each town of 3,000 inhabitants daily was a reasonable exercise of the

police power. I call atention of the Court to the dissenting opinion of Mr. Justice Shiras found on page 309 of the report, which goes into the authorities pertaining to the case; and likewise the opinion of Justices Brewer, White, and Peckham concurring in this dissenting opinion contained on page 335.

The case of Cleveland, Chicago, Cincinnati & St. L. R. R. Co., reported in 177 U. S., page 514, the head note is as follows:

"The requirement that all regular passenger trains must stop at County seats, which is made by the Illinois Act of March 21, 1874, constitutes a direct burden upon inter-state commerce in violation of the U. S. Constitution, so far, at least, as that statute requires through inter-state passenger trains to stop at such station when adequate train service has been provided for local traffic.

This case takes up a number of cases cited. It quotes from Mr. Justice Gray, as follows:

"The State may doubtless compell the railroad company to perform the duty imposed by its charter of carrying passengers and goods between its termini within the State. But so long, at least, as that duty is adequately performed by the company, the State cannot, under the guise of compelling its performance, interfere with the performance of paramount duties to which the company has been subjected by the Constitution and laws of the United States."

This case further calls attention to the fact that that of Gladson vs. Minnesota, above cited, is upheld upon the ground that it was dealing with an Intra-State railroad.

It further calls attention to the fact that the case above cited in the 173 U. S., page 285, can be upheld upon the grounds

that it only applies to three trains running each way each day and leaves a loophole for through trains.

Mr. Justice Brown, in delivering the opinion of the Court in the 177 U. S. above cited, uses this language:

"It is evident that the power attempted to be exercised under this statute would operate as a serious restriction upon the speed of trains engaged in inter-state traffic, and might, in some cases, render it impossible for trunk lines running through the State of Illinois to compete with other lines running through states in which no such restrictions were applied. If such passenger trains may be compelled to stop at county seats it is difficult to see why the legislature may not compel them to stop at every station,—a requirement which would be practically destructive of through travel, where there were competing lines unhampered by such regulations. While as we held in the Lake Shore case, railways are bound to provide primarily and adequately for the accommodation of those to whom they are directly tributary, and who not only have granted to them their franchise, but who may have contributed largely to the construction of the road, they are bound to do no more than this, and may then provide special facilities for the accommodation of through traffic. We are not obliged to shut our eyes to the fact that competition among railways for through passenger traffic has become very spirited, and we think they have a right to demand that they shall not be unnecessarily hampered in their efforts to obtain a share of such traffic. It is evident, however, that neither the greater safety of their tracks, the superior comfort of their coaches or sleeping berths not the excellence of their tables would insure them such share if they were unable to compete with their

rivals in the matter of time. The great efforts of modern engineering have been directed to combining safety with the greatest possible speed in transportation, both by land and water. The public demand this, the railway and steamship companies are anxious in their own interest to furnish it, and local legislation ought not to stand in the way of it." "While the Statute in question is operative only in the State of Illinois, it is obnoxious to the criticism made of the Louisiana statute in Hall v. DeCuir, 95 U. S. 485, that 'while it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct, to some extent, in the management of his business throughout his entire voyage. If each state were at liberty to regulate the *conduct* of *carriers* while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight regardless of the interest of others."

The principle above announced with reference to the statute requiring each train to stop at each county seat would doubly apply to a Statute that required each train to stop at each public crossing. If stopping once in each county, many miles apart, is a burden, what is to be said of a statute requiring the train to stop once each mile?

Applying this rule to the evidence in the case and it seems there can be no doubt of the effect of the statute. As stated, for the purpose of the demurrer it was admitted that the railroad could not carry on its business in consequence of the necessary delay, if required, to comply with this statute.

Another view of the operation and effect of the statute is

worthy of consideration. The statute was enacted in 1852, at a time when there were no inter-state railroads and very few others in Georgia. There is not a road in the State which attempts to comply with the statute. While the act provides that the engineer who fails to observe the same is guilty of a misdemeanor, no engineer has ever been prosecuttd for such violation, except where some special damage case rendered it necessary. It is a statute therefore enacted at a tim when inter-state railroad companies did not exist. It is recognized by the railroads themselves as inoperative. The public demands a speed that cannot be obtained and observe this statute. The public fail and refuse to prosecute the engineer violating the statutes hundreds of times every day, because doubtless they realize its hardship. Such a statute when it is apparent that if enforced it would break up inter-state railroad business; that it would prevent the mails from being carried, and render it impossible for an inter-state road to comply with the requirements of the inter-state railroad commission as well as the State Commissions the same should be declared void.

As was said by the learned Judge, who delivered the opinion in this case in the Circuit Court of Appeals:

"The question of the validity of State Statutes and orders of State railroad Commissions directing the stoppage of through inter-state trains have frequently, within late years, been before the Supreme Court of the United States. One of the recent cases is that of Mississippi Railroad Commission vs. Illinois Central 203 U. S. 335, and Atlantic Coast Line Railroad vs. North Carolina Commission, 206 U. S. 1. The late declaration by the Supreme Court is found in the opinion rendered Dec. 9, 1907 in Atlantic Coast Line Railroad vs. South Caro-

lina Commission, in which Mr. Justice Peckham speaking for that tribunal uses the following language:

"That any exercise of State authority in whatever form manifested, which directly regulates inter-staate commerce is repugnant to the commerce clause of the Constitution, is obvious. It hence arises that any command of a State, whether made directly or through the instrumentality of a railroad commission, which orders, or the necessary effect of which is to order, the stopping of an interstate train at a named station or stations, if it directly regulates inter-state commerce, is void.'"

The case of Gladson vs. Minnesota, 166 U. S., page 430, upon which the Court below rests, its decision was dealing with an intra-state railroad, and the question decided in that case, I respectfully submit, so far from being authority against my contention, is in support of it. In that case the railroad in question was chartered by the State of Minnesota; it had its franchise from that State. While it connected with other roads, it was doing purely an intra-state business. It was amenable to the power that created it. It took its franchise with a burden of obeying the conditions upon which it was created. In the case at bar the Southern Railway Company was a foreign corporation, chartered by the State of Virginia, and was operating in Georgia by virtue of the authority of an Act of Congress. While it is amenable to the laws of Georgia, the State cannot impose a burden, or in any way impede its usefulness as a means of inter-state traffic.

In the Minnesota case, stated above, the railroad was chartered by that State. In the case at Bar, the railroad is chartered by another State.

In the Minnesota case the Railroad in question was doing purely an intra-state business. In the case at Bar the railroad in question was doing principally an inter-state business.

In the Minnesota case the railroad operated by the authority of that State alone. In the case at Bar the Southern Railway operated by the authority of the Federal Congress.

The idea that a State may regulate its own creature, and the reason therefor is recognized by the learned Justice delivering the opinion in the Minnesota case, where he says, on page 431, "The Legislature of the State may well treat it as one important object of establishing a railroad within the State that public officers, parties to action, jurors, witnesses and citizens generally should be enabled the more promptly to reach and leave the centers to which their duties or business may call them, to require every regular passenger train running wholely within the limits of the State to stop at all stations, at County seats directly in its course for a few minutes and at a trifling expense, in order to take on and discharge passengers with safety, is a reasonable exercise of the police power of the State, and cannot be construed a taking of property of the company without due process of law, nor an unconstitutional interference with inter-state commerce, or with the transportation of the mails of the United States."

The case further goes on and distinguishes it from that of the Illinois Central R. R. Co., 163 U. S. 142, by calling attention to the fact that in the latter case, was where a train was running "carrying inter-state passengers and the U. S. Mails from Chicago in the State of Illinois, to places in other States South of the Ohio River, from an inter-state highway, established by authority of Congress," etc.

Thus recognizing the difference between the application of the relation to an intra-state Railroad, operating by the author-

ity of the State, and an inter-state Railroad operating by the authority of Congress.

This Court, in the case of Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., 177 U. S., on page 519, in dealing with the case of Gladson vs. Minnesota, recognizes the distinction that I have endeavored to point out between that and this, and in this case distinguishes the Gladstone case from the one being considered as to leave it of no weight as authority.

The case of Cleveland vs. Ry. Co. 177 United States, being considered, was where a Statute of Illinois, dated March 21, 1874, requiring that all regular passenger trains must stop at County seats, was held to be a direct burden upon inter-state commerce; and therefore void. On page 514 this language is used: "The requirement that all regular passenger trains must stop at County seats, which is made by the Illinois Act of March 21, 1874, constitutes a direct burden upon inter-state commerce, in violation of the United States Constitution, so far at least as that Statute requires through inter-state passenger trains to stop at such stations, when adequate train service has been provided for local traffic."

This case clearly draws the distinction; it is dealing with a statute requiring a train to stop at the county seat. The Gladson case, above cited, is likewise dealing with the same character of Statute in Minnesota. In this case the statute is held a burden upon inter-state commerce. In the Gladson case the Statute is upheld. The reason they are both upheld can only be that the one was an intra-state train being controlled, and the other an inter-state.

EFFECT OF STATUTE.

In the case of Morgan Steamship Company, 118 U. S., page

455, it is said: "In all cases of this kind it has been repeatedly held that when the question is raised whether the State statute is a just exercise of state power, or is intended by roundabout means to invade the domain of Federal authority, this court will look into the operation and effect of the statute to discern its purpose."

Applying this rule to the evidence in the case and it seems there can be no doubt of the effect of the statute. As stated, for the purpose of the demurrer it was admitted that he railroad could not carry on its business in consequence of the necessary delay, if required, to comply with this statute.

Another view of the operation and effect of the statute is worthy of consideration. The statute was enacted in 1852, at a time when there were no inter-state railroads and very few others in Georgia. There is not a road in the State which attempts to comply with the statute. While the act provides that the engineer who fails to observe the same is guilty of a misdemeanor, no engineer has ever been prosecuted for such violation, except where some special damage case rendered it necessary. It is a statute therefore enacted at a time when inter-state railroad companies did not exist. It is recognized by the railroads themselves as inoperative. The public demands a speed that cannot be obtained and observe this statute. The public fail and refuse to prosecute the engineer violating the statutes hundreds of times every day, because doubtless they realize its hardship. Such a statute when it is apparent that if enforced it would break up inter-staate railroad business; that it would prevent the mails from being carried, and render it impossible for an inter-state road to comply with the requirements of the inter-state railroad commission as well as the State Commissions the same should be declared void.

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IMPORTANCE OF THE QUESTION PRESENTED.

In presenting this application for certiorari I have not lost sight of the rule that a certiorari is not a matter of right, but one of grace, and will only be granted where the question submitted is of such importance as to require it. In this case I think it should be granted for the following reasons:

1. As a means for securing uniformity of decision among the several Courts of Appeal. The question made is one liable to arise in any jurisdiction, and it should be determined by this Court for the benefit of all.

2. It is a Federal question, involving the interest of the public, and of the Railroads through the entire State of Georgia, and through the entire United States, where the operation of inter-state Railroads are liable to be interferred with. There are thousands of such crossings in the State of Georgia where the Statute being called into question is being violated daily. It is a matter that involves, annually, many thousands of dollars. It is impossible, as appears from a quotation of a decision of the Supreme Court of Georgia, in the opinion rendered in this case, for the railroads to obey this statute. There is no effort being made to obey it; and yet if an accident happens at a crossing, under this Statute, there is absolutely no defense.

3. While the rule in the Federal Court, that a man approaching a crossing must look and listen, or he cannot recover for injury, yet this Statute requires the railroad to give notice and check so as to stop if the careless should be on the crossing.

4. The Court below rendered a divided opinion. The Court itself is therefore not uniform. The Justice writing the opinion did not subscribe to that part of it upholding the Statute in

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question. The Court of Appeals in another Ciricuit might agree on a similar question with the Judge writing the opinion in this case. Thus different opinions on the same question will arise, and it should be determined by this Court for the benefit of all.

5. The opinion of the majority in the Court below, petitioner respectfully submits, is not in line with the decisions of this Court cited in the Brief, and the question should therefore be reviewed.

Respectfully submitted,

JNO. J. STRICKLAND,

Attorney for Petitioner, So. Ry Co.

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NO.

IN THE

Supreme Court of the United States.

Southern Railway Company

Petitioner

vs.

Inez King, by next friend

Respondent

Brief for Inez King, by next friend,
in opposition to the petition for Certiorari

Reuben R. Arnold

Attorney for Respondent

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SOUTHERN RAILWAY CO.
Petitioner

vs.

INEZ KING, by Next Friend,
Respondent.

In the Supreme Court
of the
United States.

Brief for INEZ KING, by Next Friend, in Opposition to the Petition for Certiorari.

In preparing this brief we will follow the rule laid down for the filing of briefs for defendants in error and will omit a statement of the facts and will also omit any specification of the errors, except in so far as to make clear our discussion of the law.

The opinion of the Circuit Court of Appeals fully sets forth the facts. Defendant did not show how or wherein the statute of Georgia complained of interferred with interstate commerce, except that in its opinion the checking of the speed of trains would render schedules slower. The defendant in its answer

merely set up that the train which injured the plaintiff was a through train, made up in Washington, D. C., and carried the mail, express, merchandise and passengers, and was doing an interstate business; and the answer further set up the provisions of the blow post law of Georgia, and wound up with the conclusion that the statute was a burden on and impeded interstate traffic.

Upon the trial of the case, the defendant proposed to prove by Engineer Dewberry that between the South Carolina line and Atlanta, there were between ninety and one hundred crossings, counsel stating that

"There are practically one hundred road crossings, or between eighty-five and one hundred public road crossings; that the distance is one hundred and one miles; that the crossings in some localities are very close together and within a few hundred yards of each other, and in others further apart, but on the average making a crossing to a mile almost. We expect to show further, that to observe the statute, and check and keep checking so as to have the train under control, and to stop should any person or thing go on the crosing, it would consume from five to ten minutes for each crossing, dependent of course, upon the weight and length of the train and the grade; but it would make an average of seven or eight minutes."

It will be observed that this offer of testimony was vague, that it did not state how close together the crossings were, and that it did not pretend to show with any degree of accuracy how much it would impede a train from the South Carolina line to Atlanta to comply with this Act, whether it would lose one

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hour or two hours or any other given time, was not stated by counsel.

There are many inadmissible portions in the proposed testimony, and the court will observe that it was offered as a whole. If as a whole it was inadmissible, then no particular fragment can be picked out and passed on by the court. It will be further observed that there was no claim that this train carried the United States mail, and as a matter of fact, it did not, so far as the evidence shows. The counsel was indefinite as to the distance apart of the crossings. There was no attempt at exactness. He was indefinite as to the time it would delay each train. He did not show how much it would delay any given train, nor how it would prevent interstate business from being done.

It will be observed that the defendant's answer which set up this defense had been stricken by the judge, and no exception was taken to the action striking this answer, and sustaining plaintiff's demurrer. It seems to us that this is the logical way to have raised the question.

After the demurrer to this amended answer was sustained and when the defendant offered evidence to sustain the subject-matter of that answer, it follows that there was no pleading to sustain the evidence, that answer having been stricken out of the case.

But in case the Court should consider this question upon the merits, we will now discuss it.

The blow post law of Georgia is a police regulation for the public safety. It is intended to protect travelers upon the public

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highway when that highway is crossed at grade by a railroad. Grade crossings are most perilous situations. In many States they are not allowed to exist at all, either by the public law or the railroads, building over or under. It is undoubtedly within the province of the State's police power to abolish them altogether. If it can absolutely abolish them it can certainly put any conditions it pleases upon their maintenance.

It is not every remote interference with interstate commerce which is beyond the State's powers. Nearly every law of general application affects to some extent interstate commerce. If the law is not intended primarily to affect interstate commerce, and is only a police regulation for the public health, safety or morals, a remote interference with interstate commerce has been uniformly held to be within the State's power.

The Supreme Court of the United States has passed upon many cases of alleged interference with interstate commerce by the States. It has been said in several cases that each case must be decided as it comes up, and it is difficult to lay down general rules.

It has also been stated in a number of cases that the State's power to legislate upon these subjects is only limited whenever Congress has undertaken to regulate the same subject. Whenever Congress undertakes to legislate upon a particular subject matter pertaining to interstate commerce, the State cannot legislate upon the same subject so as to interfere with the national law in any particular.

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What is known as the blow post law of Georgia is found in Secs. 2220, 2221, 2222, 2223, 2224, 2225 and 2226 of the Code of Georgia. It forms one scheme for the maintenance of public highways at grade over railroads, and for the operation of trains over the same. This Act was passed in 1852, long before any railroad now operating in Georgia acquired any franchise therein. The Georgia Railroad and Banking Company, and the Central Railroad and Banking Company, were then in existence, but are not now operating at the present time under their franchises, and lessees are in possession. Therefore, every railroad company in Georgia to-day takes its franchise and its right to operate subject to the provision of this law, which has been sustained and applied by the Supreme Court of Georgia in scores of cases.

A full history of this Act will be found in Southern Railway vs. Combs, reported in 124 Ga., p 1004. The law was passed January 22, 1852. The cause of its enactment was a horrible accident which occurred on December 14, 1851 at a road crossing in Monroe county, where a carriage containing a lady and four children, driven by a negro slave, was run into by a train of the Macon and Western Railroad Company, and two of the children and the driver killed, and the other occupants seriously injured. The cases growing out of this accident were reported in the case of Railroad vs. Davis, 18 Ga., 679; Railroad vs. Wynn, 19 Ga., 440, and Railroad vs. Wynn, 26 Ga., 250. We refer the court to the Comb's decision, so far as the literature pertaining to this Act and its history, is concerned.

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The Act required, so far as this case is concerned (first) that the whistle of the locomotive be blown continuously from a post to be located four hundred yards from the crossing until the crossing is reached; if the crossing is in an incorporated town, a continuous ringing of the bell for the same distance is substituted for the blowing of the whistle. (Second) Beginning at the blow post four hundred yards away the engineer must begin to check his train and keep checking so as to stop in time, should any person or thing be upon the crossing. He is not required to bring his train to a stop. The law does not fix any number of miles per hour as the speed at which he shall run anywhere between the blow post and the crossing. If the crossing is approached from a perfectly safe place, where there is a full view on both sides of any person or vehicle which might approach, necessarily much less checking is required to stop in time, should any person or thing be upon the crossing. If the crossing is approached from a sharp curve, where the engineer would have no chance to protect the person or vehicle upon the crossing until almost upon it, then necessarily much more checking would be required.

Is it not within the province of the State to require certain measures of diligence when going over a dangerous place like this?

The thing for the railroads to do if this law works a hardship upon them is to construct, at their own expense, underground and overhead crossings wherever practicable, and reduce the number of these grade crossings to a minimun. This would be best

both for the railroads and for the public. To maintain these grade crossings is a most dangerous undertaking and is so recognized everywhere. The time doubtless will come when if they are not maintained either under ground or overhead, that there will be gates and flagmen stationed at every crossing. Could it be doubted that the law could require that the railroads maintain a flagman at every crossing? Can it be doubted that the law could require a railroad to maintain a gate at every crossing, to be opened only when trains were not near? What is the difference in principle between a grade crossing where vehicles and pedestrains pass, and running over grade crossings with another railroad company? The law is universal that every railroad must bring its trains to a complete stop before running over another railroad track crossed at grade. No one has ever doubted the legality of this provision. Where is the difference in principle betwen a grade crossing with another railroad, and a grade crossing with a highway? There is the same danger of collision in both cases—in the one case with another railroad train, and in the other case with pedestrains or vehicles.

Inasmuch as we have only to deal with the civil side in the present case, would it not be competent for the State to enact that in every case where a railway company crosses a highway at grade, that the railway company shall pay for all damages done to persons or property upon that crossing? Laws have been sustained which absolutely make railroads liable under certain circumstances, irrespective of the question of negligence. From

a civil point of view the law in question does not forbid running over highways at full speed. It merely results in making the railway company liable in case person or property is injured there.

The law can abolish grade crossings altogether. If it allows railroad companies to maintain and keep them at all, does not the railroad company, impliedly at least, consent to every condition of the law which allows grade crossings to exist? Could not the law, as a condition of maintaining a grade crossing, exact liability of the railroad company operating at such dangerous points, for injuries occurring thereon? If a municipality can regulate the speed of a train through its limits, certainly can not the State regulate the speed of a train approaching a crossing?

It would be a huge proposition to overturn the blow post and checking laws of the several States which regulate grade crossings. This is a local matter. Each State has its own particular laws upon the subject.

An examination of the cases decided by the Supreme Court of the United States will overwhelmingly sustain this law. In Sherlock vs. Alling, 93 U. S., 99, the court says:

> "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating upon all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution."

In Smith vs. Alabama, 124 U. S., 465, the statute of Alabama requiring locomotive engineers to be examined and licensed, was

held not to be a regulation of interstate commerce, and in the third head note of the report is the following:

> "Such statute, so far as it affects transactions of commerce among the States, does so indirectly, incidentally and remotely, and not so as to burden or impede them; and in the particulars in which it touches those transactions at all it is not in conflict with any enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence."

We may remark here that Congress has not enacted any legislation applicable to interstate carriers regulating the operation of trains at grade crossings. It is manifestly one of those subjects in which the State is left free to enact its own laws.

In the case of Crutcher vs. Kentucky, 141 U. S., 47, Mr. Justice Bradley uses the following language:

> "But whilst it is only such things as are clearly injurious to the lives and health of the people that are placed beyond the commercial power of Congress' yet when that power or some other exclusive power of the federal government is not in question, the police power of the State extends to almost everything within its borders; to the suppression of nuisances; to the prohibition of manufactures deemed injurious to the public health; to prohibition of intoxicating drinks, their manufacture or sale; to the prohibition of lotteries, gambling, horse-racing or anything else that the Legislature may deem opposed to the public welfare. (Citing authorities.) It is also within the undoubted province of the State Legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in regard to the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and, generally, with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce. Such regulations

are eminently local in their character, and in the absence of congressional regulations over the same subject, are free from all constitutional objections, and unquestionably valid."

The case of Chicago, etc. R. R. vs. Solan, 169 U. S., p 133, involved the validity of an Iowa statute prohibiting contracts to exempt a railroad company from liability, as a common carrier. The railway made the claim that as to interstate carriers this was a regulation of commerce, but the Supreme Court of the United States held otherwise, and Justice Gray, on pp 137 and 138 of the decision uses the following language:

> "The rules prescribed for the construction of railroads and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits. Such are the grounds upon which it has been held to be within the power of the State to require the engineers and other persons engaged in the driving and management of all railroad trains passing through the State to submit to an examination by a local board as to their fitness for their positions; or to prescribe the mode of heating passenger cars in such trains."

In Lake Short R. R. vs. Ohio, 173 U. S., 286, a statute of Ohio which required every railroad company operating within the State to cause three of its regular passenger trains each way daily to stop at every village containing over three thousand inhabitants long

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enough to receive and let off passengers, was held to be a valid law, and not an improper regulation of interstate commerce.

In Gladson vs. Minnesota, 166 U. S., 427, it was held to be within the police power of the State to require all trains running between points within the State of Minnesota, to stop at county seats to let off and take on pasengers.

The exact question, as it occurs to us, involved in the present case, was decided in the case of Erb vs. Morasch, 177 U. S., 584, in which it was held that "a regulation by a city of the speed of railroad trains within the city limits is not, as to interstate trains, an unconstitutional regulation of interstate commerce,—at least, until Congress takes action in the matter."

In the case from which the quotation has just been taken, a regulation of Kansas City, Kansas, restricted the speed of all trains within its limits to six miles per hour. The objection there made is the identical one made in the case at bar, to-wit, that to cause the speed to slow down interfered with the rapid transit of these trains, and thus interfered with the carriage of the mails and of interstate commerce. There is not a particle of difference in principle betwen the two cases. To require a train to slow up its speed for a grade crossing no more interferes with interstate commerce than to bring it dow nto the speed of six miles in a city. If one city could pass such an ordinance all cities could pass it. There are doubtless nearly as many villages, towns and cities as grade crossings. The principle which lies at the bottom of the decisions sustaining these laws is that they are intended to pro-

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mote the public safety, and are not primarily regulations of commerce, and only affect it incidentally and remotely. In other words, as Justice Gray said in the Iowa case before cited, such regulations of the State are in aid of commerce. They make commerce safe and more advantageous to the public. The commerce which the United States wants to promote is not the commerce which takes life, or scatters pestilence, but the commerce which is reasonable, and which promotes the public safety, health and welfare. For this reason the regulations of the State which save life and health aid that commerce.

The cases cited upon the other side are not at all in point. The case of Cleveland R. R. vs. Illinois, 177 U. S., 514, held to be invalid an Illinois act which required all through interstate passenger trains to stop at every county seat, when adequate train service had already been provided for local traffic. This law of Illinois was said to be a direct burden upon interstate commerce, and justly so. The regulation attempted by the Illinois statute in this case was sheer tyranny. The railroad gave, and could be compelled, to give the county seats all the train service they required. After such train service was given, it neither aided the public health safety, commerce or convenience to require through trains to stop. Such a law was a mere attempt to fiix an arbitrary and unreasonable schedule for the railway company. It was beyond dealing with the mere question of convenience.

But it is obvious that an interstate mail train is as dangerous to life upon a public grade crossing as is a local train. There

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is nothing arbitrary or unreasonable which makes the Georgia grade crossing law apply to all trains. Any of them will take life when a colilsion occurs with a pedestrian or vehicle. It was for this reason that in the Erb case before cited the ordinance of the Kansas town limiting the speed of interstate trains, as well as intrastate trains was upheld. If the State law is to apply to any trains at grade crossings it must necessarily apply to all of them. The law applies to any train which can go at high speed and take life. It would be absurd to enact a law which would say that a local freight or passenger train shall observe certain requirements of care at a crossing and thus save life, while an interstate mail train is allowed to observe no requirements whatever, and to take life ad libitum.

In the case just cited, of Cleveland, etc. R. R. vs. Illinois, 177 U. S., 514, Justice Brown reviews all the cases where State regulation of carriers has been sustained, and all of those in which such regulations have been held invalid.

The only other cases necessary to notice, holding a State regulation of the operation of trains doing interstate comemrce invalid, is Illinois vs. Illinois C. Rwy., 163 U. S., 141, in which a State statute requiring a fast mail train carrying interstate passengers over an interstate highway, to delay the transportation of the passengers and mail, by turning aside from the direct interstate route, and running to another station on another track 3 1-2 miles away from a point on the direct route and back again to the same point because such station is a county seat, and

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where the railroad furnishes adequate accommodation for the county seat, was held to be an unconstitutional interference with interstate commerce and to the passage of the mails, and justly so. It will be observed that no question of public safety, health or morals was there involved, and the railroad had adopted by its schedules a scheme which gave the county seat in question all the trains it required, and yet gave to interstate commerce in the carriage of the mails the benefit of the highest speed obtainable betwen remote points.

In the Court below, two of the Circuit judges, Judges Pardee and Shelby, presided together with District Judge Burns, of Texas. The two Circuit judges concurred in the opinion that the statute of Georgia was a valid exercise of the police power, while District Judge Burns dissented

Judge Burns based his dissent mainly upon Central of Georgia Railway Company vs. Hall, 109 Georgia, 367; same case, 34 S. E., 605. In that case, the Supreme Court of Georgia upheld and enforced the blow post law of Georgia; but Chief Justice Simmons was merely stating his own views of the hardship of this law when he made the remark in the course of his opinion, that the statute was a hard one and that it was impossible for the railroads to transact the business of the country and obey it. He wound up his remarks upon the subject, however, by stating:

"Still, it is the law of the land and the courts must enforce it, however hardly it may work upon the business interests

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of the country if it should be observed, or upon the railroads when they violate it."

Other judges of the Supreme Court of Georgia, equally as distinguished, have enforced the law and thought it was a wise one.

Chief Justice Jackson, in the case of Brunswick and Western Railroad vs. Hoover, 74 Georgia, 428, in alluding to this law and after explaining its provisions, said:

> "Not only, therefore, is it negligence, but negligence of the grossest and gravest character, not to comply with these statutory enactments to preserve human life on the public highway, when that highway crosses the railroad track; so grave that it is made criminal not to comply with these enactments."

The blow post law was again enforced in the case of Williams vs. Southern Railway Company. 126 Georgia, 710; and again in the case of Central of Georgia Railway Company vs. North, reported in 129 Georgia, 106; and again in Western and Atlantic Railroad vs. York, 128 Georgia, 687.

We forbear to cite further cases in which this law has been enforced, and the dictum of Judge Simmons in the Hall case is the only expression of any judge which we have found in any of the Georgia cases which in any way intimates that the blow post law is a hard law.

We submit that the remarks of Judge Simmons in the Hall case, that it was impossible for the railroads to transact the business of the country and obey this law, are unwarranted and not borne out by a consideration of the Act The law does not

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require a train to absolutely stop at a crossing, but only to be in a condition of checking. In the great majority of instances there are no persons on or near the crossing, and in such cases very little checking is required. In the instance of many crossings, the view on either side of the railroad is unobstructed for quite a distance, and an engineer can readily see that he can run over the crossing without the possibility of striking any person. He is only required to have his train in a condition of checking when somebody is liable to be in danger near the crossing, and ought not the law of Georgia protect human life under such circumstances?

Judge Burns thought that the statute was valid as to domestic corporations, but unreasonable as to trains engaged in interstate commerce. We submit that the statute is entirely valid as to both classes of trains.

Respectfully submitted,

Charles H. Fle
Reuben R. Arn

Attorneys for respondent.

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

NO. 141.

SOUTHERN RAILWAY CO. Plaintiff in Error, vs. INEZ KING, by Next Friend, MRS. JOSEPHINE KING, Defendant.	IN ERROR TO THE COURT OF APPEALS OF THE FIFTH DISTRICT.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

INEZ KING, by her next friend, JOSEPHINE KING, filed her suit in the Superior Court of Habersham county, on the 24th day of September, 1904, for Fifteen Thousand ($15,000.00) dollars, against the SOUTHERN RY. CO., alleging, in substance, that, on the 20th day of September, 1903, she and her father, A. O. King, and her mother, Josephine King, were riding in a buggy and approached a crossing of the defendant Railway, at a place where they could not see the approach of a train and the train of the defendant Co., as they were crossing, ran into them.

She alleged that the Railroad was negligent in that the train was running in violation of the Statute of the State of Georgia requiring it to check and keep checking, when approaching a crossing. That she was injured, and she prayed judgment.

The Southern Railway Co., the defendant below, removed the case into the United States Circuit Court for the Eastern Division of the Northern District of Georgia.

In addition to the general answer filed, the Railway Co. filed an Amendment to its answer under an Order of the Court, in words as follows: (Page 22 of Record.)

"Now comes the Southern Railway Company, the defendant in the above stated case, and by permission of the Court first obtained, amends its answer already filed, and says plaintiff should not recover in this case for the following additional reasons:

PARAGRAPH XI.

At the time plaintiff alleges she was injured and for many years prior thereto, and now, defendant controls and operates a line of railroad from the City of Washington, D. C., through the States of Virginia, North Carolina, South Carolina, and into and through Georgia; said line forming a continuous line of railroad, the same having been formed under the Act of Congress, for the purpose of facilitating commerce among the several states, and the postal and military communications of the United States, and to that end for the purpose of carrying passengers, freight, government mails, troops and supplies from one state into another.

PARAGRAPH XII.

Defendant further shows that the train which plaintiff alleges injured her was a through train made up in the City of Washington, D. C., carrying U. S. mail, and

an express car of merchandise, and passenger coaches with passengers going from one state into another; and this defendant by said train was doing an inter-state business, under the authority and control of the Congress of the United States.

PARAGRAPH XIII.

Defendant further shows that the statute of Georgia, which is in these words, to-wit:

"There must be fixed on the line of said road, at the distance of 400 yards from the center of each of said crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof so as to stop in time should any person or thing be crossing said track on said road," the violation of which plaintiff alleges as the negligence in this case, is and was inoperative as to defendant's train, which plaintiff alleges injured her, for the reason that it is in violation of Section 8, Article First, of the Constitution of the U. S., which gives to Congress the right to "regulate commerce with foreign nations, and among the several states and with the Indian Tribes."

PARAGRAPH XIV.

Your defendant further shows that the Statute of Georgia is not a reasonable regulation of the police power of the state to secure the safety of persons, but that the Statute is a direct burden on and impedes the

inter-state traffic being done by this defendant, and impairs the usefulness of its facilities for such traffic.

PARAGRAPH XV.

Defendant further shows that it is impossible to observe said Statute and carry the mails as defendant is required to carry them under the contract it has with the government; and it is likewise impossible to do an inter-state business, and at the same time comply with the terms of said Statute.

Wherefore, it says that said Statute is inoperative as to it, and it should not be required to comply with the same on its inter-state line of railroad.

All which it stands ready to verify and prays that it be hence discharged with its reasonable cost."

The plaintiff below demurred to this amendment upon the ground that the same did not set up a defense good in law. After argument the Hon. W. T. NEWMAN, Judge, presiding, sustained the demurrer and struck the amendment. The case then went to trial.

During the progress of the case Ben Dewberry, an Engineer of the Company, was a witness on the stand and the following occurred:

"BEN DEWBERRY, stated that:

'There are between ninety and one-hundred crossings on the Southern Railway, between the South Carolina line and Atlanta."

"Plaintiff's counsel said:

'I object to that qnestion and to the answer, because

incompetent, immaterial and inadmissible. I think the entire case should be confined to this crossing.'

"Counsel for defendant then stated:

'I expect to prove that between the South Carolina line and Atlanta, there are practically one-hundred road crossings, or between eighty-five and one-hundred public road crossings; that the distance is one-hundred and one miles; that the crossings in some localities are very close together, and within a few hundred yards of each other, and at others farther apart, but on the average making a crossing to the mile almost. We expect to show further, that to observe the Statute and check and keep checking so as to have a train under control, and to stop should any person or thing be on the crossing, it would consume from five to ten minutes for each crossing dependent, of course, upon the weight and length of the train, and the grade; but it would make an average of seven or eight minutes. We wish to show that this train was made up and known as No. 39, the vestibule train which runs from the City of Washington, through the States of Virginia, North Carolina, South Carolina and Georgia; that it was carrying passengers from one state to another, also carrying an express car with freight on it, from one state to another. We wish and expect to show that obedience to that Crossing Act would hinder, and practically prevent inter-state business being done by the defendant railroad. We wish to show the condition I have just stated all existed at the time this accident occurred, on the 11th of October, 1903.'"

"By the Court:

'The testimony will be excluded, and you may have an exception noted to this ruling.'"

A verdict was rendered for the plaintiff below. Motion for New Trial was made and overruled, and the case then carried to the United States Circuit Court of Appeals, being No. 1635 of the Fifth Circuit.

On the 3d day of March, 1908, the United States Circuit Court of Appeals handed down an opinion affirming the judgment of the Court below; all of the Justices of said Court agreeing upon all the propositions in the case, except the demurrer to the amended answer above set forth, and as to this proposition two of the Justices only assenting to the opinion, the other expressing a different view. A copy of said opinion as rendered appears in Record page 112

A petition was made by the Southern Railway Co. for a Writ of Certiorari, which was granted on May 21, 1908. (Page 121 of Record.)

THE QUESTIONS INVOLVED AND HOW RAISED.

Thus, one question is made, namely: whether or not the Blow post Statute of Georgia, above set out, infringes upon the Commerce Clause of the Federal Constitution. The question was raised, first, by the amended answer, and, second, by the evidence tendered by Dewberry, being first raised by pleading and then by evidence.

POOR

SPECIFICATION OF ERRORS RELIED UPON.

The errors relied upon are:

1. Striking the amended answer.

2. Rejecting the evidence of Dewberry.

3. Holding the Blow post Statute of Georgia does not contravene the Commerce Clause of the Federal Constitution.

BRIEF.

I.

CONSTITUTIONAL QUESTION PROPERLY MADE.

1. The amendment filed by the defendant below alleging that the following Statute of Ga. known as the Blow Post Statute, to-wit: "There must be fixed on the line of said roads, and at a distance of four hundred (400) yards from the center of each such road crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road." is void because a burden upon Interstate commerce was in proper form and conformed to the laws of Georgia on the subject and properly raised the constitutional question mentioned therein.

S. F. & W. Ry. vs. Hardin, 110 Ga. 433.
Brown vs. State, 114 Ga. 60.
Sayor vs. Brown, 119 Ga. 542.

2. When a constitutional question is not made or passed upon in the law Court, the Court of Review will

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not consider it, though afterward argued there. The reverse of the proposition is likewise true.

Butler vs. Merritt, 113 Ga. 241.
Lafitte vs. Burke, 113 Ga. 1000.
State vs. Henderson, 120 Ga. 781.
Newkirk vs. Sou. Ry. Co., 120 Ga. 1048.
Parkham vs. Potts Thompson Liquor Co. 127 Ga. 303.

3. Amendments to pleadings are authorized by Sections 5097 and 5098 of the Code of Ga. which are as follows: Sec. 5097. "All parties, whether plaintiffs or defendants, in the Superior or other Courts, whether at law or in equity, may, at any stage of the cause, as matter of right, amend their pleadings in all respects, whether in matter of form or of substance, provided there is enough in the pleadings to amend by. The defendant, after the first term, cannot set up new matter by way of amendment, except as provided in Section 5057."

Section 5098. "A petition showing a plaintiff, and a defendant, and setting out sufficient to indicate and specify some particular fact or transaction, as a cause of action, is enough to amend by. The jurisdiction of the Court may be shown and the details and circumstances of the particular transaction may be amplified and varied by amendment. If the declaration omit to allege facts, essential to raise the duty or obligation involved in the cause of action which was evidently originally intended to be declared upon, the omitted fact may be supplied by amendment."

Ellison vs. G. F. R., 87 Ga. 691.
Eagle Phoenix Mills vs. Muscogee Mfg. Co., 129 Ga. 715.

The same rule of amendments applies to the defendant's answer, except as to affidavit required by Section 5057 of the Code.

Roundtree vs. Rutherford, 65 Ga. 447.
Winn vs. Winn, 109 Ga. 255.

The section 5057 referred to as amended, is as follows: "The defendant, after the time allowed for answer has expired, shall not, in any case, by amendment set up any new facts or defense of which notice was not given by the original plea or answer, unless at the time of filing such amended plea or answer containing the new matter, he shall attach an affidavit that, at the time of filing the original plea or answer, he did not omit the facts or defense set out in the amended plea or answer, for the purpose of delay and that the amendment is not now offered for delay, or unless in the discretion of the Court the circumstances of the case or substantial justice between the parties require that such amendment be allowed without attaching such affidavit."

Acts of 1897, Page 35.

If the proper affidavit is attached, the Judge has no discretion but must allow the amendment.

The Judge in his discretion may allow the amendment without affidavit.

Marsh vs. Hicks, 110 Ga. 888.

The absence of the defendant is a reason for allowing the amendment without affidavit.

Boss vs. Guarantee City Co., 119 Ga. 127.

An attorney may make an affidavit.

Paullain vs. Pigg, 66 Ga. 263.

Any agent may make the affidavit.

Code 3035.

The Act, itself, does not provide who shall make the affidavit, but simply says: "Shall attach an affidavit."

II.

The evidence of Dewberry, offered and rejected by the Court, properly raised the constitutional question. All that is required by the laws of Ga. is that the question shall be raised below, and be passed on directly or indirectly and appear in the Record either in the pleadings, or the evidence, or other parts of the record.

Parker vs. Potts Thompson Liquor Co., 127 Ga. 303.
S. F. & W. Ry. Co. vs. Hardin, 110 Ga. 433.
Newman vs. State, 101 Ga. 534.
Lafitte vs. Burke, 118 Ga. 1001.

The objections to the evidence of Dewberry were not upon the ground that there was no pleading authorizing it. Under the law of Ga. all objections to evidence not made are waived.

Jackson vs. State, 88 Ga. 784.
Steed vs. Cruise, 70 Ga. 168.
Christian vs. State, 86 Ga. 430.
Rhinehart vs. Blackshear 105 Ga. 799.
Summers vs. State, 116 Ga. 535.

III.

Commerce among the States consists, among other things, in intercourse and traffic, including in these terms the transportation and transit of persons and property and the instrumentalities thereof.

County of Mobile vs. Kimball, 102 U. S. 691, (26 L. E. 238.)
McCall vs. Calif, 136 U. S. 104 (34 L. E. 391.)
Williams vs. Fears, 179 U. S. 270 (45 L. E. 186.)
Champion vs. Ames, 188 U. S. 321 (47 L. E. 136)

IV.

THE RESERVE POWER OF THE STATES.

There is no reserve power in the States to, in any way, regulate inter-state commerce. Where the apparent exercise of power has been upheld by the Courts, the power was either the mere declaration of a common law duty as applied to the instrumentalities of inter-state commerce or the exercise of some other reserved power not pertaining to commerce.

Cooke on Commerce Clause of Federal Constitution, pages 111 to 124, inclusive.

Western Union Tel. Co. vs. Call Pub. Co., 181 U. S. 92. (45 L. E. 765.)

Elliott on R. R. Vol. 3, page 1156.

V.

POLICE POWER OF THE STATE.

If the authority to regulate an interstate railroad train at a public crossing is embraced in the police power of a State, that authority must be so exercised as not to *burden* or *impede* the interstate traffic of the company, or *impair* the *usefulness* of its *facilities* for the traffic. "The police power of a State is not unlimited and is subject to judicial review, and when exercised in an arbitrary or oppressive manner, such laws may be annulled as violative of the rights protected by the constitution.

Ill. Cent. R. R. vs. Ill., 163 U. S. 154.

L. S. & M. S. R. R. vs. State of Ohio, 173 U. S. 285.

(Dissenting opinion and authorities cited on pages 309 and 335.)

Cleveland & Chicago R. R. vs. St. Louis R. R. 177 ~~107~~ U. S. 514.

Miss. R. R. Commission, vs. Ill. Cent. 203 U. S. 335.

Atlantic Coast Line vs. N. C. Commission, 206 U. S. 1.

Morgan Steamship Co. vs ————————, 118 U. S. 455.

Jacobson vs. Mass. 197 U. S. 25.

Lawler vs. Steele, 152 U. S. 133.

Henderson vs. N. Y., 92 U. S. 259.

Lockner vs. N. Y., 198 U. S. 45.

Holden vs. Hardy, 164 U. S. 366.

Connelly vs. Union Sewer-pipe Co., 184 U. S. 540.

Gibbs vs. Ogden, 9th Wheat, 1 and 210.

Sennot vs. Davenport, 22 Howard, 227.

Mo. Ry. Co. vs. Harber, 169 U. S. 613.

Dobbins vs Los Angeles, 195 U. S. 223.

McLean vs. Ark., 211 U. S. 547.

"Commerce with foreign nations and between the states, which consists in transportation of persons or property between them, is a subject of national character and requires uniformity of regulation. Congress, alone, can deal with such transportation and its non-action is a declaration that it shall remain free from burdens imposed by State legislation."

Gloucester Ferry Co. vs. Penn., 114 U. S. 196, (29 L. E. 158.)

"Although it is expressly provided that the power of Congress to regulate shall be exclusive, it is obvious that in order to be effective, the exercise thereof must exclude the exercise of any conflicting power under authority of the State; inconsistent State legislation being to that extent superseded."

Cooke on Commerce Clause of Federal Constitution, page 109.

County of Mobile vs. Kimball, 102 U. S. 691. (26 L. E. 238.)

Leisy vs. Hardin, 135 U. S. 100. (34 L. E. 128.)

It is said with reference to the police power of a State that, "no definition of it, and no urgency for its use, can authorize a State to exercise it in regard to a subject matter which has been confided to the discretion of Congress, by the Constitution, but nothing is gained in the argument by calling it the police power."

Henderson vs. Mayor of N. Y. 92 U. S. 259 (23 L. E. 543.)

"Local enactment or regulation, even if based upon the acknowledged police power of a State must always yield in case of conflict with the exercise by the general Government of any power it possesses under the Constitution, or any right that instrument gives or secures."

Jacobson vs. Mass. 197 U. S. 25, (49 L. E. 649.)

"In general terms it may be said, that Federal control of commerce begins as soon as the subjects or operations of commerce are subjected to burdensome State legislation."

Prentice & Eagan on Commerce Clause of Federal Constitution, Page 61.
Walling vs. Michigan 110 U. S. 446.
Robinson vs. Taxing District, 124 U. S. 489.
Asher vs. Texas 128 U. S. 129.
McCall vs. Calif, 139 U. S. 104.
Brennan vs. City of Titusville, 153 U. S. 289.

VI.

The Statute under review is unconstitutional and void as to Inter-state railroads, for the following reasons:

1. There is no common law duty on a carrier to check its trains at a crossing, so as to stop if any per-

son or thing should be thereon, and there is no reserve power in a State to impose such burden on an Inter-state carrier.

2. The Act as applied to through trains is unreasonable. "The reasonableness or unreasonableness of a State enactment in a given case will determine whether or not the same is a proper exercise of police power."

L. S. & M. S. R. R. Co. vs. State of Ohio, 173 U. S. 301.

3. The Act in effect is to regulate an Inter-state carrier, and, thus, Inter-state commerce. "So long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its own will that such commerce shall be free and untrammeled, and any regulation of the subject by the State is repugnant to such freedom."

Brown vs. Houston, 114 U. S. 622 (29 L. E. 257.)
Welling vs. Mo., 91 U. S. 275 (23 L. E. 471.)
Transportation Co. vs. Parkersburg, 107 U. S. 691 (27 L. E. 584.)

To regulate is defined: "To adjust by rule, method, or established mode; to direct by rule, or restriction; to subject to governing principles or laws." (Webster's International Dictionary.)

4. The effect of the Statute is to burden, impede, and to impair the usefulness of the facilities of Inter-state carriers for such traffic.

Ill. Cent. R. R. Co. vs. Ill., 163 U. S. 154.
Miss. R. R. Commission vs. Ill. Cent., 203 U. S. 346.

5. The Statute is not observed, and the engineers are not prosecuted for its violation, though the Statute so requires.

Penal Code of Ga., Section 517, provides: "If any engineer fails to blow the whistle and to check the speed as required, by Section 2222 of the Civil Code, he shall be punished as for a misdemeanor."

6. The Statute was passed before the days of Inter-state railroads; it was enacted by the State for the railroads of the State as they were then operated. Inter-state carriers operate by virtue of an Act of Congress passed since the day of the Ga. Statute, and which had the effect to supersede the Blow post Statute of Ga.

U. S. Revised Statutes, Par. 5258.

The evolution of the business world has rendered obsolete the Statute under review.

VII.

THE GA. DECISION OF THE QUESTION.

The constitutionality of the Ga. Statute under consideration has never been passed on by the Supreme Court of Ga. until recently, in the case of the Sou. Ry. Co. vs. Grizzle, reported in the 131st Ga. Page 287. That decision is a mere head-note decision. The only part of it bearing on the question is the first head-note, which is in these words: "The provision of the Civil Code Section 2222, requiring the engineer of a locomotive to check the speed thereof on approaching a public crossing, so as to stop in time should any person or thing be crossing, is not, with respect to a railroad company doing an Inter-state business, violative of Section 8, Article 1, of the Constitution of the United States, as being a regulation of Inter-state commerce, but is a

police regulation designed to secure the public safety, and is valid, as such.

Hennington vs. State, 90 Ga. 396. (17 S. E. 1009.)

Seale vs. State, 126 Ga. 644, (55 S. E. 472.)

Hennington vs. Ga. 163 U. S. 299, (16 Sup. Court, 1086, 41 L. E. 166.)

The Court committed no error in refusing to allow an amendment offered by the defendant railroad Co., in this case, alleging that the Code Section above cited was void because of being violative of the provisions of the Constitution of the United States above referred to, and that the failure to comply with the requirements of such Code Section by the defendant company, in the operation of one of its trains then engaged in doing an Inter-state business, could not lawfully be attributed to it as negligence."

This decision is predicated upon the case of Hennington vs. State of Ga., 163 U. S. 299. The Hennington case is of doubtful soundness. Mr. Justice Brewer took no part in the decision. The Chief Justice and Mr. Justice White dissented. The decision has since been criticised by Mr. Justice Shiras, in the case of L. S. & M. S. R. R. vs. State of Ohio. 173 U. S. 296, in words as follows: "If, as has often been said, Christianity is part of the common law of the several States, and if the U. S. in their legislative and executive departments throughout the country, since the foundation of the Government, have recognized Sunday as a day of rest and freedom from compulsory labor, then such a law as that of Ga., being based upon a public policy common to all the States, might be sustained; but, if put upon a ground now declared in the opinion of the Court in the present case, namely, as an exercise of the police power of the State, and, as such, paramount to the control of Congress in administering the commerce clause of the Con-

stitution, then it is apparent, as I think, that the decision in Hennington vs. Ga. was wrong, and the Judges dissenting in that case were right.

If, as a matter of local policy, one State may forbid Inter-state trains from running on the Christian Sabbath, an adjoining State may select a Jewish or Seventh Day Sabbath, as the day exempt from business. Another State may choose to consecrate another day of the week in commemoration of the Latter Day Saint and Prophet who founded such State, as the proper day for cessation from daily labor. Or, what is more probable, one or more of the States may think fit to declare that one day in seven is not a sufficient portion of the time that should be exempt from labor, and establish two or more days of rest. The destructive effect of such inconsistent and diverse legislation upon Inter-state commerce, carried on in trains running throughout the entire country, is too obvious to require statement or illustration."

The case has, in effect, been over-ruled by the more recent cases cited on the brief. There is no other Statute in existence like the one under review and hence no direct authority.

The Hennington case was dealing with a Statute of Ga. which requires all freight trains not to run after (8) o'clock on Sunday morning until twelve (12) o'clock that night, with certain exceptions specified. The difference between requiring the freight trains to stop running a part of one day in the week, and requiring all trains to stop at every crossing every day in the week is marked.

If the Hennington case is sound as to the Statute it was dealing with, it is not authority for upholding a Statute which both regulates and burdens commerce.

VIII.

Adjudicated cases of this court are all in line of our contention. The decision of this case by the Court of Appeals was based on a misconception of Gladson vs. Minnesota, 166 U. S. 430.

ARGUMENT.

I.

FEDERAL QUESTION PROPERLY MADE.

It is conceded that a Federal question was made. Was it properly raised?

1. Under Section 914 of the Revised Statutes of the United States, it is provided that the practices, pleadings, forms, and modes of proceeding in Civil causes, other than Equity and Admiralty causes in the Circuit and District Courts, shall conform as nearly as may be to the practices, pleadings, forms, and modes of proceeding existing at the time in like causes in the Court of Record of the State in which such Circuit and District Courts are held. This cause having been tried in the Circuit Court being held in Georgia, we must look to the law of that State as to the mode of raising such questions. The rule under the Georgia law is that, in order for a Court of Review to pass upon the constitutionality of an Act of the Legislature, the Act must be brought into question in the Trial Court and passed on by the Judge thereof, either directly or by implication. It must appear in the record that the question was before the Trial Judge and he passed on it, or should have passed on it.

Savannah, Fla. & Western Ry. Co. vs. Hardin, 110 Ga. 433.
Brown vs. State, 114 Ga. 60.
Sayr vs. Brown, 119 Ga. 542.

2. When a constitutional question is not made or

passed upon in the lower Court, the Court of Review will not consider it, though afterwards argued there. The reverse of the proposition is also true.

Butler vs. Merritt, 113 Ga. 241.
Lafitte, et al vs. Burke, 113 Ga. 1000.
State vs. Henderson, 120 Ga. 781.
Newkirk vs. Southern Ry. Co., 120 Ga. 1048.
Parham & Co. vs. Potts-Thompson Liquor Co., 127 Ga. 303.

These cases comprise all the recent expressions of the Supreme Court of Georgia on the subject. The Amendment filed by the defendant and already set out, it will be seen, contains none of the defects mentioned in these cases. It sets out the Georgia Statute, of which it complains, and the clauses of the Federal Constitution which, it is alleged, it contravenes, and why.

3. If the Amendment, filed and stricken, was germane and in proper form, the question was probably made. The law of Amendment to pleadings in Georgia is exceedingly liberal. Either plaintiff or defendant may amend at any stage of the case, in form or substance, if there is anything to amend by. In the case at Bar, the defendant had filed an answer at the first Term, denying the allegations of plaintiff as to liability which was the general issue in effect. The Code of Georgia, of 1895, Section 5097, on the subject of Amendment, provides: "All parties, whether plaintiffs or defendants, in the Superior or other Courts, whether at law or in Equity, may, at any stage of the cause, as matter of right, amend their pleadings in all respects, whether in matter of form or of substance, provided

there is enough in the pleadings to amend by. The defendant, after the first Term, cannot set up new matter by way of Amendment, except as provided in Section 5057."

The Code, Sec. 5098, has undertaken to codify the principle announced in a number of decisions, including the case of Ellison vs. Georgia, Florida, Ry. Co., 87 Ga., 691, and is in these words:

"A petition showing a plaintiff, and a defendant, and setting out sufficient to indicate and specify some particular fact or transaction as a cause of action, is enough to amend by. The jurisdiction of the Court may be shown, and the details and circumstances of the particular transaction may be amplified and varied by Amendment. If the declaration omit to allege facts essential to raise the duty or obligation involved in the cause of action which was evidently intended to be declared upon, the omitted fact may be supplied by Amendment."

See also Eagle & Phoenix Mills vs. Muscogee Mfg. Co., 129 Ga. 715.

The same rule applies to Amendments by the defendant, as to his plea or answer, that applies to the plaintiff.

Roundtree vs. Rutherford, 65 Ga., 447.
Winn vs. Winn, 109 Ga., 255.

The only difference between an Amendment filed by the plaintiff and that filed by the defendant is the requirements of the Statutes as to an affidavit. The Code of Georgia of 1895, Section 5057, as amended by the Acts of 1897, Page 35, is as follows: "The defendant, after the time allowed for answer has expired, shall not, in any case, by Amendment, set up any new

facts or defense, of which notice was not given by the original plea or answer, unless at the time of filing such amended plea or answer containing the new matter, he shall attach an affidavit that, at the time of filing the original plea or answer, he did not omit the new facts or defense set out in the amended plea or answer for the purpose of delay; or unless, in the discretion of the Court, the circumstances of the case or substantial justice between the parties require that such Amendment be allowed without attaching an affidavit."

If the proper affidavit is attached, the Judge has no discretion, but must allow the Amendment.

Winn vs. Winn, 109 Ga. 256.
Ala. Midland Ry. vs. Guilford, 114 Ga. 628.

The Judge, in his discretion, may allow the Amendment without affidavit.

Marsh vs. Hicks, 110 Ga. 888.

The absence of the client is a reason for allowing the Amendment without an affidavit.

Boss vs. Guarantee City Co., 119 Ga. 127.

In this case, however, the affidavit was, in fact, made to the Amendment by the Counsel in charge of the case. (See Page 29 of the Record.) It will be observed that the Statute does not require an affidavit to be made by the defendant, but merely an affidavit.

In this instance it was done by the person who best knew the facts. In Georgia, an attorney may make an affidavit to an Amendment, or, indeed, to any pleading,

for a defendant who resides out of the County where the case is being tried.

Paullain vs. Pigg, 66 Ga., 263.

An Agent may make an affidavit. Code of Ga. 1895, Section 3035.

The Demurrer to the amended answer was upon the ground that it did not set up a legal defense and, therefore, necessarily waived any question as to form.

II.

QUESTION RAISED BY EVIDENCE.

The question was again raised by the evidence of Dewberry, as to the number of crossings between the South Carolina Line and Atlanta, and the time it would take to observe the Statute. (See Page 22 of the Record.)

The Court of Appeals in deciding this case, held that the tender of this evidence did not again raise the question. The learned Judge, in speaking of this evidence, says: "The only object and avowed purpose of tendering this testimony was to show the invalidity of the Statute, in so far as it related to trains engaged in Interstate traffic, and this, without special plea, would not be permissible under the practice and pleading obtaining in Georgia.

* * * * * *

The validity or invalidity of a Statute cannot be considered upon Appeal, unless the Record shows that the question was distinctly raised in the pleadings in the Court below."

The two cases cited by the learned Judge in support of the propositions are those of Parham & Co. vs. Potts-Thompson Liquor Co., reported 127 Ga. 303, and the case of the Savannah, Fla., & Western Ry. Co. vs. Hardin, 110 Ga. 433. The Parham & Co. case is a head-note decision, and the only reference to the question under consideration is in the first head-note, which is in these words: "An averment in a pleading that a named Statute is unconstitutional and void, is too vague and indefinite to raise any question for determination." This does not deal with the proposition as to how the question shall be raised but simply decides what is not a sufficient raising. The case of the Savannah, Fla., & Western Ry. Co. is dealing solely with the question as to whether or not the constitutionality of the Statute may be brought in question by Demurrer. The learned Judge who wrote that opinion was on the Bench and wrote the opinion in the case of Newman vs. State, 101 Ga. Page 534. In that opinion he used this language: "Under a general Demurrer, the constitutionality of the law under which the accused was arraigned was brought in question."

This evidently was going too far. Indeed, the same learned Judge writing the opinion as wrote the opinion in the Newman case, in the course of his argument, uses this expression: "These statements in the Bill of Exceptions will not be sufficient to raise the question when the Record shows that the question was not distinctly raised in the pleadings in the Court below." In that case, the only way it could have been raised was by the pleadings.

Counsel was insisting that the general Demurrer without more, had sufficiently raised it, and that statements in the Bill of Exceptions saved it. It was with this question the Judge was dealing and, while it is authority, to the effect that a constitutional question cannot be raised by a general Demurrer which makes no reference to the question, it is, by no means, exhaustive nor authority that the question cannot be raised except by pleading.

As an evidence that the learned Judge did not mean to confine an attack upon a legislative Act to the pleading, I quote from the decision rendered by the same Judge in the case of Lafitte vs. Burke, 113 Ga., page 1001, as follows: "No Court should ever pass upon the constitutionality of a Legislative Act, unless the *Record* indicates clearly, and specifically points out the reason why the Act is claimed to be unconstitutional." The word *Record* is broader and not only embraces the pleading but anything that might happen in the case.

Under the Georgia practice a plaintiff files no pleading except his declaration, but if the defendant should set up a defense by virtue of an unconstitutional Statute, a plaintiff would attack the same by oral Demurrer, or by objecting to evidence. The case would go to the Supreme Court with these facts appearing in the Bill of Exceptions, or in the Record made up, and the rules of the law would be complied with. If it were true that the unconstitutionality of an Act could not be brought in question, except by pleading, it would follow that in Georgia a plaintiff could never question an Act relied

on by the defendant. It is necessary that the question be raised in some legitimate way and passed on by the Trial Judge, and that this fact appear, before the record of it can be reviewed by the Appellate Court. There is no reason why this cannot be done as well by the Demurrer to evidence as any other way.

The only thing decided in the Savannah, Fla. Ry. case, above noted, is embraced in the first head-note, and is in these words:

"When a record brought to this court contains nothing from which it could even be inferred that any question of the constitutionality of a particular Statute upon which the plaintiff's action was based, was at any stage of the case made in the Trial Court, or that such Court, in any manner, undertook to pass upon such a question, the mere fact that the Bill of Exceptions assigns error upon a refusal to sustain a general Demurrer to the petition and dismiss the action, and also upon the over-ruling of the motion for a new trial containing a ground alleging that the verdict was contrary to law, does not properly raise here any question upon the constitutionality of such Statute; and this is so, though the Bill of Exceptions does in general terms state that the above indicated rulings were erroneous because that Statute was "class legislation and special legislation and obnoxious to the Constitution of the State, and therefore void' and requires 'impossibilities and puts as a penalty the value of the goods lost, and takes the property of defendant without any just compensation therefor, and, therefore, amounts to confiscation which is unconstitutional and void."

While a private conversation does not amount to authority, yet it is at least permissible to state that Judge Cobb, who delivered these opinions, states now that he

did not intend to hold that the only way a constitutional question could be raised was by the pleading.

The evidence, when offered, was not objected to on the ground that there was no pleading to sustain it. The objection was (See page 22) : "I object to that question and to the answer, because indefinite, immaterial, and inadmissible. I think the entire case should be confined to these crossings."

It is a well settled rule under the Georgia practice, that all objections to evidence, not made, are waived. The objection must be made at the time the evidence is offered and the grounds thereof stated.

Jackson vs. State, 88 Ga., 784.
Steed vs. Cruise, 70 Ga., 168.
Christian vs. State, 86 Ga., 430.
Reinhart vs. Blackshear, 105 Ga., 799.
Summers vs. State, 116 Ga., 535.

Thus, as the question was presented to the Trial Judge, as to whether or not the evidence was admissible, it was the same as if pleading was then of file, authorizing the evidence, and in excluding the evidence, the Judge was passing upon a question as to whether or not the Blow Post Statute was constitutional. An exception was allowed to the Judge's ruling, and it became part of the Record, and under the ruling made by the Supreme Court of Ga. in the cases above cited, the question was proper to be considered by the Court of Review.

We insist, therefore, that the Federal question was made in the two ways mentioned. The Trial Judge in his charge to the jury, recognized that the question had

been made by the evidence when he charged the jury as follows: "Under the Statute of Georgia, Gentlemen, which has been referred to, it is the duty of the engineer of trains in Georgia, when approaching a crossing, to blow the whistle as has been stated by you, and to check and keep checking their trains as they approach the crossing, so as to be able to stop them, if any person or thing should be upon the crossing. That is the Statute of this State, and it is entirely clear that they were not doing that in this case, so there is no question that the Railroad, through its servants, and employes, was guilty of negligence.

I, therefore, charge you, as a matter of law, that the defendant, through its servants, Agents and employes, was guilty of negligence."

III.

COMMERCE, WHAT IS.

That an Inter-state railroad carrying passengers, mail and express, is an instrumentality of commerce and protected by the commerce clause of the constitution is too well established by the authorities cited on the brief, as well as others, to admit a question. Whatever rule applies therefore to Inter-state commerce, under the law, applied to the train of the railroad company being run at the time the injury under consideration occurred.

IV.

THE APPARENT LEGAL EFFECT UPON INTER-STATE COMMERCE IS BY VIRTUE OF SOME OTHER RESERVE POWER.

While under the police powers reserved in the states, and giving the states the authority to enact such laws

as may be necessary for the protection of the public morals, public health, and public safety, these powers must be exercised so as not to affect Inter-state commerce or the instrumentalities thereof; otherwise, they are void.

The right to regulate commerce cannot exist both in a state and in the Federal Government. When the right was ceded to the Federal Government the whole right and not a part thereof was so ceded. The only thing reserved by the state in so far as commerce and its instrumentalities are concerned is the right to enforce the common law duties imposed upon such instrumentalities of commerce. While there is no common law of the United States, yet in most of the States, it exists. The duty imposed by common law on a carrier whether Inter-state or Intra-state, must be performed, and a State can enforce that performance. In each instance where a State Statute apparently affecting the instrumentalities of Inter-state commerce has been upheld by this court, such Statute was merely declaratory of the common law duty owed by the railroad.

Mr. Elliot in his work on Railroads, Vol. 3, page 1156, in discussing the common law duties of a railroad company at crossings, says: "The company must exercise reasonable care to provide sufficient men and proper appliances for the control of the train; must when necessary provide suitable warnings of danger at highway crossings, and on the approach of trains to crossings, warnings must be given which will apprise the traveler in the use of ordinary care, of the danger of the situation. The signals must be given at such a time and the

speed of the train so regulated that the warning may be effectual to the traveler to whom the duty is due."

This common law duty to give notice of the approach of the crossing may be declared by Statute, that is to say, a State may declare what will constitute a compliance with this common law duty; and hence that part of the Statute under consideration which requires the whistle to blow four hundred yards before reaching the crossings, is a mere statutory declaration of what shall constitute a compliance with a common law duty.

It is likewise a common law duty of a carrier to exercise ordinary care in passing populous localities and to regulate the speed of the train accordingly. It is therefore within this power for the States to provide the speed of the trains through cities. This is a mere statutory declaration of what shall be a compliance with the common law duty of running at a safe speed through places frequented by the public.

It is likewise a common law duty for carriers to stop sufficient trains at the various stations to accommodate the traveling and shipping public, and hence the Statute requiring three trains each day to stop at towns having a population of three thousand, is a mere statutory declaration of what is a compliance with this common law duty.

In other words, wherever there is a common law duty of a carrier, the State may prescribe what shall be a compliance with that duty, but when it imposes a duty not embraced in those under the common law, in so far

as it affects the instrumentalities of Inter-state commerce, the same is void.

There is nothing under the common law requiring a carrier to stop its trains at road crossings. When the State of Georgia undertakes to require an Inter-state train to stop at each crossing, regardless as to whether or not there are persons thereon, it is dealing with a duty not imposed under the common law, a right therefore not reserved in the State.

Under the common law, the duty is on the traveler to look and listen for the approach of a train before crossing. The Statute under consideration reverses the rule and in effect requires the railroad to look and listen and to stop.

Under the Statute, the traveler is not required to stop, but he may proceed on his way, and the train must stop until he passes.

Mr. Cooke in his work on Commerce Clause of the Federal Constitution, Pages 112 to 124, inclusive, lays down the rule as above stated and among other things says:

"When it is apparent that a State is regulating Commerce, the power being exercised is derived from some other authority, which power has been reserved in the State. Assuming then as well established, the rule that, under certain conditions at least, the power of Congress to regulate is exclusive of any exercise of such power under authority of a State, even in the absence of exercise of the power by Congress, there arises the question whether it is not exclusive *in all cases*. We submit that it is, and for a time, at least, such view obtained some counte-

nance. That is to say, in this view, strictly speaking *in no case can Commerce within the scope of the Commerce clause be regulated under authority of a State.* It is true indeed, that action taken under authority of a State may effect such Commerce, but we submit that *in every case this is merely the incidental result of the exercise under authority of a State, not of the power to regulate Commerce but of some other distinct power reserved to the States* 'All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from *distinct powers*; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.' We shall endeavor hereafter to demonstrate the application of this principle in detail; an illustration will suffice here. Either Congress or a State may take action with reference to the transportation of diseased live-stock from State to State, and in their outward aspect there may be no distinction between action in one case and in the other. But Congress is *directly regulating the transportation of such live-stock*; the State is *directly regulating the sale* thereof, within its limits, prohibition of such transportation from State to State, being merely an essential incident of the regulation of sale within the State.

It must be admitted, and will, indeed, hereafter be seen that there are decisions of the Supreme Court not in harmony with the distinction just stated, but it would seem to us to be better to regard them as departures from sound principle than to manufacture a new and arbitrary distinction for the purpose of explaining them." (Cooke on the Commerce Clause, Pages 111-113, inclusive.) (See, also, Pages 113-124, Cooke."

"The principles of the common law are operative upon all Inter-state commercial transactions, except as

far as they are modified by Congressional enactment." Western Union Tel. Co. vs. Call Pub. Co., 181 U. S. 92 (45 L. E. 765.)

V.

THE POLICE POWER OF A STATE.

If the authority to enact the Statute under consideration was reserved in Georgia by virtue of its police powers, still, this power is not unlimited, and is subject to judicial review, and when exercised in an arbitrary or oppressive manner, such law may be annulled as violative of the rights protected by the Federal Constitution.

In the case of Jacobson vs. Massachusetts, 197 U. S., page 25, Mr. Justice Harlan delivering the opinion, uses this language: "A local enactment or regulation even if based on the police powers of a State, must always yield in case of conflict with the exercise by the Government of any power it possesses under the Constitution, or with any right which that instrument gives or secures."

In the case of Lawton vs. Steel, 152 U. S., 133, the court uses this language: "The extent and limits of what is known as the police power have been a fruitful subject of discussion in the Appellate Courts of nearly every State in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance * * * * To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a

particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive but is subject to the supervision of the courts."

Henderson vs. New York, 92 U. S., 259.

In the case of Lochner vs. New York, 198 U. S., 45, in discussing a New York Statute limiting he hours of labor of employes in bakeries, etc., this language is used. "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be * * * In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty etc. * * * This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it

within the police power of the State? And that question must be answered by the court."

In the case of Holden vs. Hardy, 169 U. S., 366, the rule is stated: "The question in each case is whether the legislature has adopted the Statute in the exercise of a reasonable discretion or whether its action be a mere excuse for an unjust discrimination or the oppression or spoliation of a particular class."

In the case of Connolly vs. Union Sewer Pipe Company, 184 U. S., 540, Mr. Justice Harlan delivering the opinion, uses this language: "The question of constitutional law to which we have referred cannot be disposed of by saying that the Statute in question may be referred to what are called the police powers of the State, which, as often stated by this Court, were not included in the grants of power to the general government, and therefore reserved to the States when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the constitution or Statutes of the States to the contrary notwithstanding, a Statute of a law, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a State enactment, whatever may be the course from which the power to pass such enactment may have been derived. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the Supreme law. The State has undoubtedly the power, by appropriate legislation, to protect the morals, the public health and the public safety, but if, by their necessary operations, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

Gibbons vs. Ogden, 9 Wheat 1, 210; Sennot vs. Davenport, 22 How. 227; Missouri, etc. Railroad Company vs. Haber, 169 U. S., 613

In the case of Dobbins vs. Los Angeles, 195 U. S., 223, the rule is thus stated: "But the exercise of the police power is subject to judicial review and property rights cannot be wrongfully destroyed by arbitrary enactment."

In the case of McLean vs. Arkansas, 211 U. S., 547, the doctrine is thus stated: "The police power of the State is not unlimited and is subject to judicial review, and when exercised in an arbitrary or oppressive manner, such laws may be annulled as violative of the rights protected by the Constitution."

The same principle has been announced in a number of other cases, but these are sufficient to establish the proposition that granting the Statute under consideration is within the police powers and the reserved right of the State of Georgia, yet if the Statute at the same time is oppressive or is unreasonable or is a burden upon the rights granted under the Federal Constitution, the same shall be declared void.

Assuming the rule to be that any act of a State whether direct or otherwise has the effect to materially interfere with Inter-state commerce, this Court will declare the same void; what are the facts as applied to the case under review? The demurrer filed to the amended answer admitted everything alleged therein; among the rest, it admitted that it was impossible to do an Inter-state business and at the same time comply with the terms of the Statute under review. This being admitted,

it would seem to follow that under the authorities the Statute could not be upheld as applicable to Inter-state commerce.

From the Record it is apparent that from the S. C. line where the train reached the Ga. line to Atlanta, was a distance of about one-hundred (100) miles with an average of a crossing to the mile. That it would take an average of seven (7) minutes to the crossing to observe the statute under review, or seven hundred (700) minutes for that journey. The schedule time for that train from the S. C. line to Atlanta, was about three (3) hours and a half, or the total time to run a train one hundred (100) miles under the Statute would be fifteen (15) hours, making an average of a little over six miles per hour. This Statute, in effect, therefore, requires an Inter-state railroad to run its trains in Ga. at a speed of six (6) miles per hour. If the Statute under review had enacted in so many words that a train should not run in Ga. beyond six (6) miles per hour, I take it that this Court would not hesitate to declare the same an unreasonable exercise of the police power of the State. It has been frequently held by this Court, and the doctrine reiterated in the case of the railroad commissioners of N. C. cited on the brief, that any exercise of state authority in whatever form manifested which directly regulates, or the necessary effect of which is to regulate Inter-state commerce, is void. (See also Atlantic Coast Line R. R. Co. vs. S. C. Commission decided Dec. 9, 1907.)

If, therefore, the State could not regulate the speed of an Inter-state train by reducing it to six (6) miles an hour, and I think that will be conceded, I submit that a Statute which has that effect, likewise cannot be sustained under the police power of the State.

It is claimed that the Statute under consideration was enacted for the public safety, under the reserve power of the State to enact such laws as may be necessary for the safety of the public. When analyzed, it will be seen that it does not apply to the whole public; it is only to that small per cent of the public that may use the road crossings. It does not apply to all those, in fact, but simply to that per cent of persons traveling upon the dirt road who violate the duty imposed on them by the common law of looking and listening before crossing a railroad track. This per cent being so small, as compared to the public at large, it would be an unreasonable regulation, and an unreasonable burden upon the Inter-state carrier to require that it is to run its trains in such way as could not exceed six (6) miles an hour, for the sake of this small per cent of the careless public.

The ceded powers to the general government, while few in number are plenary in extent. To regulate commerce among the several States was one of the ceded powers. When Congress saw fit to authorize railroads to form continuous lines through the several States for the purpose of doing an Inter-state business, every obstacle in the way of exercising this conferred authority

was, thereby, legally removed; the State was powerless to prevent a foreign railroad train from entering its borders; the power it once had as to a train had been given up to the general government. If it could not prevent a train from entering its borders, it could no more regulate the train after entering them.

So far as Inter-state commerce was concerned, and the instrumentalities thereof, State lines were wiped out; the strong arm of the Federal government extended to all points therein, protecting its creatures, that is, the instrumentalities of Inter-state commerce from interference with the free exercise of the authority conferred.

When the Southern Railway, by virtue of this Act of Congress started its train through Ga., no State line was recognized by the general government, and a train had the same right to run in Ga., regardless of the Statute as it did to run in a State without such Statute.

VI.

THE REASONS WHY THE STATUTE IS VOID.

1. There is no common law duty on the carrier to check his train at a crossing to the extent of stopping if any person or thing shall be on the crossing, and there is no reserve power in the State to impose such burden on the Inter-state carrier. The Act under review is statutory and contravenes the common law.

2. The Act as applied to Inter-state trains, is unreasonable. It was said in the case of L. S. & M. S. Ry. Co. vs. State of Ohio, 173 U. S. 301. "The reasonableness or unreasonableness of a State enactment in a given case, will determine whether or not the same is the proper exercise of police power." It is apparent from the brief, that a train observing the Statute under review, would be reduced to six (6) miles an hour; yet if one State enact such a regulation, so could all and the effect would be to reduce fast trains, competing with each other, to a gait equal to the stagecoach of our ancestors. It is easy to see how an Inter-state railroad would be hampered in competing with a rival road, one going through Ga., and the other not. The roads of equal length could not carry passengers in the same time if one had to linger for a hundred miles through Ga., at the rate of six (6) miles an hour, while its competitor was running fifty (50) miles or more. The Act, therefore not only regulates the instrumentalities of commerce when in Georgia, but regulates the same in its whole trip and in procuring business and passengers. It is, therefore, an unreasonable regulation and void.

3. The Act in effect is to regulate Inter state commerce, and the instrumentalities thereof; whereas, the same can only be done by Congress. In the case of Brown vs. Houston, 114 U. S. 622, it is said: "So long as Congress does not pass any law to regulate commerce among the several states, it thereby indicates its own will that such commerce shall be free and un-

trammelled and any regulation of the subject by the state is repugnant to such freedom."

4. The effect of the Statute under review, is to *burden*, *impede*, and to *impair*, the usefulness of the facilities of Inter-state commerce for such traffic. In the case of the Ill. Cent. R. R., 164 U. S., cited on the brief, the rule is announced that if a Statute had the effect to do either one; that is to say, if it was a burden upon, or had the effect to *impede*, or had the effect to *impair* the usefulness of the facilities of an Inter-state carrier, such Act would be void.

5. The Statute is not observed. The Criminal Court of Georgia makes it a misdemeanor for an engineer to fail to observe this Statute, and yet, it is violated thousands of times every day in the year, and no prosecution, unless some one is injured. The public recognizes that it is a law which cannot be observed. Surely a Statute so uniformly recognized as obselete, should not be held valid. The Statute was passed before the days of Inter-state railroads; indeed, it was passed at a time when there were but few railroads of any kind, and before they ran even on a schedule. The Act violates no provision of the State Constitution, but it was recognized by the Supreme Court of Ga., more than once as obselete. When the Act was passed, railroad trains made their trips like stage-coaches; the State regulated their action at crossings which, at the time, was little burden. A train running eight (8) or ten (10) miles an hour, by

schedule, could observe that Statute with little inconvenience. Business interests, competition, and rapid transit, have all developed in the State, but the Statute did not evolve with it. Inter-state commerce made its appearance, which was neither contemplated nor provided for, when the Statute was passed. While the State has not seen fit to abolish the Act by the legislature, the great public has abolished it by its demand upon the railroads, and the railroads, in turn, have ignored it in compliance with that demand. It now only serves the purpose of enabling the careless to recover, in alleging its violation as an act of negligence.

VII.

THE QUESTION PASSED ON IN GEORGIA.

The question made has never been passed on by the Supreme Court of Ga., until recently, in the case of the So. Ry. Co. vs. Grizzle; that decision is a head-note decision, reported 131 Ga., 287, and is copied in the brief in this case. It will be observed the decision is predicated upon that of Hennington vs. State, 163 U. S., 299. The Hennington case, at best, is of doubtful soundness. Mr. Justice Brewer took no part in the decision; the Chief Justice and Mr. Justice White dissented. The decision has since been criticised by Mr. Justice Shiras, in the L. S. & M. S. R. R. vs. the State of Ohio, 173 U. S., 309. The Hennington case, I think, in effect,

has been over-ruled by the more recent cases, and especially the Miss. Commission case, and the N. C. Commission case cited on brief.

Granting, however, that the Hennington case is sound, it is still not authority for upholding the Statute under review; the difference between requiring the freight trains to stop at eight (8) o'clock Sunday morning and remain still until twelve o'clock that night, which was the statutory requirement being considered in the Hennington case, and requiring *all* trains to stop at *every* crossing *every* day, is marked. Apply the rule of reasonableness, to the two Statutes, and it might be said that it was a reasonable regulation, for the State to require freight trains to suspend operation a part of the day on Sunday, and yet it would be unreasonable to require every train, both freight and passenger, to practically run six (6) miles an hour at all times, and everywhere.

The question was never passed on by the Supreme Court of Ga. until after the case at Bar had been tried in the Court below. That decision, however, is not controlling on this Court; the construction of the Statute, by the Supreme Court of Ga. is binding, but whether or not the Statute, as construed, constitutes a burden upon Inter-state commerce is a question that this Court will decide for itself. 118 U. S. 356.

That the Statute under considerstion is a burden has been recognized by the Supreme Court of Ga., in the

case of Central R. R. Co., vs. Hall, 109 Ga. page 69, when the Chief Justice delivering the opinion says: "We agree with the learned counsel that this law which requires trains to check and keep checking when approaching a crossing is a hard one, and that it is impossible for the railroads of the country to transact the business of the country and obey it. It was passed about fifty (50) years ago, before the people appreciated the necessity of rapid transit in travel and in freight. If the law was duly obeyed by the locomotive engineers, I am informed that it would take twelve (12) hours or more to run a passenger train from Atlanta to Macon, a distance of about one hundred (100) miles. Still it is the law of the land and the Courts must enforce it, however hard it may work upon the business interests of the country, if it should be observed, or upon the railroads when they violate it."

The Chief Justice of Ga. using this language was dealing with the Statute as applied to the Intra-State road. They furnish however the judicial information that the Statute, itself, violates the commerce clause of the Federal constitution. The Statute and this decision, giving the effect of it, furnished the evidence that the Statute is a burden upon Inter-state commerce.

An Inter-state carrier must either obey the Statute and thus be unable to do the business of an Inter-state carrier, as was alleged in the amended answer and admitted by the demurrer, or it must do the business in violation of of the Statute, and be held responsible for any injury that may result. When Congress authorized the So. Ry. Co. to do an Inter-state business, and to compete with other Inter-state carriers, surely it did not contemplate that it should take either horn of such a

dilemma as this. It contemplated, rather, that such a barrier would be removed by the Courts, if the same should get in the way.

VIII.

ADJUDICATED CASES.

The Statute under consideration is peculiar to Ga. I have found nothing like it any where else, nor have I ever been able to find an authority dealing directly with the question made. In a number of States, Acts have been passed with reference to railroad crossings. In Conn. (Conn. Statute, Section 3489) authority is given on proper case made, to require a grade crossing removed at the joint expense of the railroad and County. This was held a reasonable exercise of the police power of a State, in the case of the town of Westbrook, Conn. (57 Conn. report 95.)

The State of Iowa Statute, Par. 2072, requires all trains to have their engines blow their whistles sixty (60) rods before reaching a crossing and to ring a bell until the crossing is passed, except in the city, where they are required only to ring the bell. The State of Mass., (Revised Laws, Chapter III, Par. 188,) provides for the ringing of a bell and blowing the whistle of engines approaching a crossing. The State of Penn., in 1871, passed an Act, in effect prohibiting grade crossings under certain conditions. This Act was upheld, in the case of Penn. R. R. Co. vs. Braddock Electric Railroad Co., 152 Penn. State, 116.

In the case of Toledo etc. Railroad Co. vs. Jockinson, 67 Ill., 37, the Supreme Court of the State of Ill. held that the Statute of Ill. requiring railroads to keep a flagman by day and a red light by night, at crossings, was an unreasonable burden upon Inter-state commerce and should be held unconstitutional. A number of other Statutes are found requiring railroads to signal their approach to crossings, but none requiring a train to check. A number of cases are found prescribing the duty of a railroad train going through a thickly populated community, to run at such speed as to be safe to travelers, and, in conformity with City ordinances, limiting the speed to a given number of miles an hour, which have been held reasonable on account of the populous condition of the city.

Mr. Elliott, in his work on Railroads, Vol. 2, Par. 668, uses this language: "The authorities are agreed that when the trains move upon, or across, highways their speed may be regulated, but there is a contrariety of opinion as to whether the speed of trains operating exclusively upon the private property of the company can be limited."

He cites as authority to support this text a number of State cases, but so far as I have been able to find they have all dealt with intra-railroads and the question at bar was not involved. A kindred question and the principle has been before the U. S. Supreme Court several times.

In the case of Ill. Central R. R. Co. vs. Ill., 163 U. S., page 154, it was held that an act of the State of Ill.,

requiring all trains to stop at the town of Cairo was an unreasonable exercise of police power of the State as applied to Inter-state railroads.

In the case of Gladstone vs. Minnesota; 166 U. S., page 431, it was held that the doctrine announced in the 163d U. S., above quoted was not applicable because the road in question was an Intra-state railroad.

In the case of Lake Shore & Michigan Southern Ry. Co. vs. State of Ohio, reported in the 173d U. S., page 285, it was held that a Statute requiring three trains each way to stop at each town of 3,000 inhabitants daily was a reasonable exercise of the police power. I call attention of the Court to the dissenting opinion of Mr. Justice Shiras found on page 309 of the report, which goes into the authorities pertaining to the case; and likewise the opinion of Justice Brewer, White, and Peckham concurring in this dissenting opinion contained on page 335.

The case of Cleveland, Chicago, Cincinnati & St. L. R. R. Co., reported in 177 U. S., page 514, the head note is as follows:

"The requirement that all regular passenger trains must stop at County seats, which is made by the Illinois Act of March 21, 1874, constitutes a direct burden upon Inter-state commerce in violation of the U. S. Constitution, so far, at least, as that Statute requires through Inter-state passenger trains to stop at such station when adequate train service has been provided for local traffic."

This case takes up a number of cases cited. It quotes from Mr. Justice Gray, as follows:

"The State may doubtless compel the railroad com-

pany to perform the duty imposed by its charter of carrying passengers and goods between its termini within the State. But so long, at least, as that duty is adequately performed by the company, the State cannot, under the guise of compelling its performance, interfere with the performance of paramount duties to which the company has been subjected by the Constitution and laws of the United States."

This case further calls attention to the fact that that of Gladson vs. Minnesota, above cited, is upheld upon the ground that it was dealing with an Intra-State railroad.

It further calls attention to the fact that the case above cited in the 173 U. S., page 285, can be upheld upon the grounds that it only applies to three trains running each way each day and leaves a loophole for through trains.

Mr. Justice Brown, in delivering the opinion of the Court in 177 U. S., above cited, uses this language:

"It is evident that the power attempted to be exercised under this Statute would operate as a serious restriction upon the speed of trains engaged in Inter-state traffic, and might, in some cases, render it impossible for trunk lines running through the State of Illinois to compete with other lines running through States in which no such restrictions were applied. If such passenger trains may be compelled to stop at County seats, it is difficult to see why the legislature may not compel them to stop at every station,—a requirement which would be practically destructive to through travel, where there were competing lines unhampered by such regulations. While as we held in the Lake Shore case, railways are bound to provide primarily and adequately for the accommodation of those to whom they are directly tributary, and who not only have granted to them their franchise, but who may have contributed largely to the construc-

tion of the road, they are bound to do no more than this, and may then provide special facilities for the accommodation of through traffic. We are not obliged to shut our eyes to the fact that competition among railways for through passenger traffic has become very spirited, and we think they have a right to demand that they shall not be unnecessarily hampered in their efforts to obtain a share of such traffic. It is evident, however, that neither the greater safety of their tracks, the superior comfort of their coaches or sleeping berths, nor the excellency of their tables, would insure them such share if they were unable to compete with their rivals in the matter of time. The great efforts of modern engineering have been directed to combining safety with the greatest possible speed in transportation, both by land and water. The public demand this, the railway and steamship companies are anxious in their own interest to furnish it, and local legislation ought not to stand in in the way of it." "While the Statute in question is operative only in the State of Illinois, it is obnoxious to the criticism made of the Louisiana Statute, in Hall vs. DeCuir, 95 U. S., 485, that 'while it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct, to some extent, in the management of his business throughout his entire voyage. If each State were at liberty to regulate the *conduct* of *carriers* while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight regardless of the interest of others."

The principle above announced with reference to the Statute requiring each train to stop at each county seat would doubly apply to a Statute that required each train to stop at each public crossing. If stopping once in each county, many miles apart, is a burden, what is to be said

of a Statute requiring the train to stop once each mile?

Applying this rule to the evidence in the case and it seems there can be no doubt of the effect of the Statute. As stated, for the purpose of the demurrer it was admitted that the railroad could not carry on its business in consequence of the necessary delay, if required, to comply with this Statute.

Another view of the operation and effect of the Statute is worthy of consideration. The Statute was enacted in 1852, at a time when there were no Inter-state railroads and very few others in Georgia. There is not a road in the State which attempts to comply with the Statute. While the act provides that the engineer who fails to observe the same is guilty of a misdemeanor, no engineer has ever been prosecuted for such violation, except where some special damage case rendered it necessary. It is a Statute therefore enacted at a time when Inter-state railroad companies did not exist. It is recognized by the railroads themselves as inoperative. The public demands a speed that cannot be obtained and observe this Statute. The public fail and refuse to prosecute the engineer violating the Statutes hundreds of times every day, because doubtless they realize its hardship. Such a Statute when it is apparent that if enforced it would break up Inter-state railroad business; that it would prevent the mails from being carried, and render it impossible for an Inter-state road to comply with the requirements of the Inter-state railroad commission, as well as the State Commissions, the same should be declared void.

As was said by the learned Judge, who delivered the opinion in this case in the Circuit Court of Appeals:

"The question of the validity of the State Statutes and orders of State railroad Commissions directing the stoppage of through Inter-state trains have frequently, within late years, been before the Supreme Court of the United States. One of the recent cases is that of Mississippi Railroad Commission vs. Illinois Central 203 U. S. 335, and Atlantic Coast Line Railroad vs. North Carolina Commission, 206 U. S. 1. The late declaration by the Supreme Court is found in the opinion rendered Dec. 9, 1907 in Atlantic Coast Line Railroad vs. South Carolina Commission, in which Mr. Justice Peckham speaking for that tribunal uses the following language:

" 'That any exercise of State authority in whatever form manifested, which directly regulates Inter-state commerce is repugnant to the commerce clause of the Constitution, is obvious. It hence arises that any command of a State, whether made directly or through the instrumentality of a railroad commission, which orders, or the necessary effect of which is to order, the stopping of an Inter-state train at a named station or stations, if it directiy regulates Inter-state commerce, is void.' "

The case of Gladson vs. Minnesota, 166 U. S. page 430, upon which the Court below rests, its decision was dealing with an Intra-state railroad, and the question decided in that case, I respectfully submit, so far from being authority against my contention, is in support of it. In that case the railroad in question was chartered by the State of Minnesota; it had its franchise from that State. While it connected with other roads, it was doing purely an Intra-state business. It was amenable to the power that created it. It took its fran-

chise with a burden of obeying the conditions upon which it was created. In the case at Bar the Southern Railway Company was a foreign corporation, chartered by the State of Virginia, and was operating in Georgia by virtue of the authority of an Act of Congress. While it is amenable to the laws of Georgia, the State cannot impose a burden, or in any way impede its usefulness as a means of Inter-state traffic.

In the Minnesota case, stated above, the railroad was chartered by that State. In the case at Bar, the railroad is chartered by another State.

In the Minnesota case the Railroad in question was doing purely an Intra-state business. In the case at Bar the railroad in question was doing principally an Inter-state business.

In the Minnesota case the railroad operated by the authority of that State alone. In the case at Bar the Southern Railway operated by the authority of the Federal Congress.

The idea that a State may regulate its own creature, and the reason therefor is recognized by the learned Justice delivering the opinion in the Minnesota case, where he says, on page 431, "The Legislature of the State may well treat it as one important object of establishing a railroad within the State that public officers, parties to action, jurors, witnesses and citizens generally should be enabled the more promptly to reach and leave the centers to which their duties or business may call them, to require every regular passenger train running wholly within the limits of the State to stop at all stations, at County seats directly in its course for a few

minutes and at a trifling expense, in order to take on and discharge passengers with safety, is a reasonable exercise of the police power of the State, and cannot be construed a taking of property of the company without due process of law, nor an unconstitutional interference with Inter-state commerce, or with the transportation of the mails of the United States.

The case further goes on and distinguishes it from that of the Illinois Central R. R. Co., 163 U. S. 142, by calling attention to the fact that in the latter case, was where a train was running "carrying Inter-state passengers and the U. S. Mails from Chicago in the State of Illinois, to places in other States South of the Ohio River, from an Inter-state highway, established by authority of Congress," etc.

Thus recognizing the difference between the application of the relation to an Intra-state Railroad, operating by the authority of the State, and an Inter-state Railroad, operating by the authority of Congress.

This Court, in the case of Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., 177 U. S., on page 519, in dealing with the case of Gladson vs. Minnesota recognizes the distinction that I have endeavored to point out between that and this, and in this case distinguishes the Gladson case from the one being considered as to leave it of no weight as authority.

The case of Cleveland vs. Ry. Co. 177 United States, being considered, was where a Statute of Illinois, dated March 21, 1874, requiring that all regular passenger trains must stop at County seats, was held to be a direct burden upon Inter-state commerce, and therefore void.

On page 514 this language is used: "The requirement that all regular passenger trains must stop at County seats, which is made by the Illinois Act of March 21, 1874, constitutes a direct burden upon Inter-state commerce, in violation of the United States Constitution, so far at least as that Statute requires through Inter-state passenger trains to stop at such stations, when adequate train service has been provided for local traffic."

The case clearly draws the distinction; it is dealing with a Statute requiring a train to stop at the county seat. The Gladson case, above cited, is likewise dealing with the same character of Statute in Minnesota. In this case the Statute is held a burden upon Inter-state commerce. In the Gladson case the Statute is upheld. The reason they are both upheld can only be that the one was an Intra-state train being controlled, and the other an Inter-state.

EFFECT OF STATUTE.

In the case of Morgan Steamship Company, 118 U. S. Page 455, it is said: "In all cases of this kind it has been repeatedly held that when the question is raised whether the State Statute is a just exercise of State power, or is intended by roundabout means to invade the domain of Federal authority, this court will look into the operation and effect of the Statute to discern its purpose."

Applying this rule to the evidence in the case and it seems there can be no doubt of the effect of the Statute. As stated, for the purpose of the demurrer, it was admit-

ted that the railroad could not carry on its business in consequence of the necessary delay, if required, to comply with this Statute.

Another view of the operation and effect of the Statute is worthy of consideration. The Statute was enacted in 1852, at a time when there were no Inter-state railroads and very few others in Georgia. There is not a road in the State which attempts to comply with the Statute.

It is a Statute therefore enacted at a time when Inter-state railroad companies did not exist. It is recognized by the railroads themselves as inoperative. The public demands a speed that cannot be obtained and observe this Statute. The public fail and refuse to prosecute the engineer violating the Statutes hundreds of times every day, because doubtless they realize its hardship. Such a Statute when it is apparent that if enforced it would break up Inter-state railroad business; that it would prevent the mails from being carried, and render it impossible for an Inter-state road to comply with the requirements of the Inter-state railroad commission as well as the State Commissions the same should be declared void.

The Statute viewed from any stand-point is manifestly a burden upon Inter-state commerce. The railroads must pay the penalty of violating the Statute, or the Courts must relieve them from the burden. The Statute is a burden, and being such, this Court, under its

often repeated rulings that such a Statute cannot exist, will declare this one void.

Respectfully submitted,

JNO. J. STRICKLAND,

Attorney for Plaintiff in Error.

A. P. THOM,

HAMILTON McWHORTER,

McDANIEL, ALSTON & BLACK,

Of Counsel.

United States Supreme Court

OCTOBER TERM, 1909

No. 144

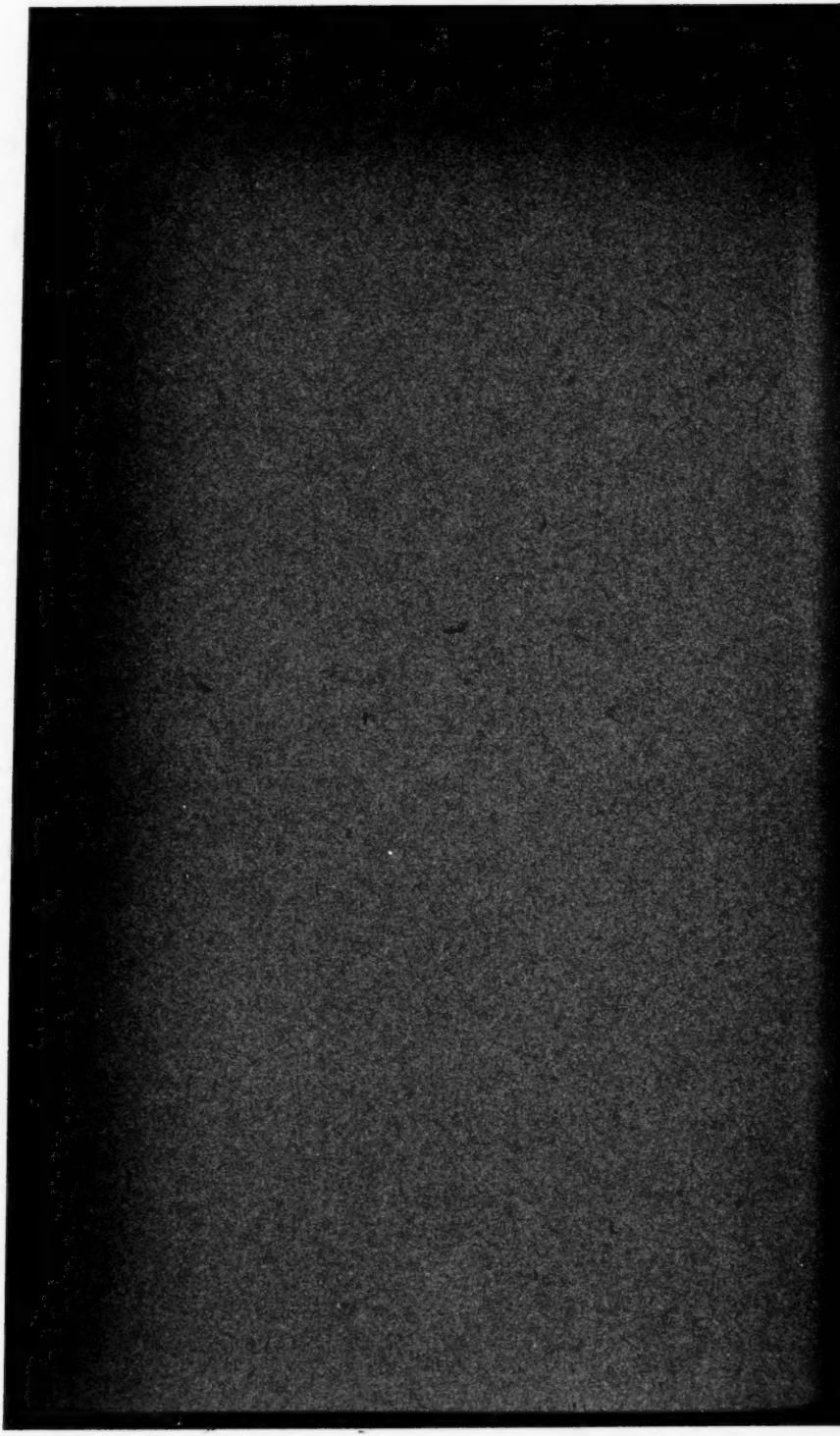
SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR

v.

INEZ KING, by next friend,
Josephine King,
Defendant in Error

BRIEF FOR DEFENDANT IN ERROR

REUBEN R. ARNOLD,
Attorney for Defendant in Error



IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM 1909.
No. 141.

Southern Railway Company,
Plaintiff in Error,
vs.
INEZ KING, by next friend.
Josephine King,
Defendant in Error.

Certiorari to the
Circuit Court of Appeals of the United
States,
For the Fifth Circuit.

BRIEF FOR DEFENDANT IN ERROR.

Constitutional Questions Not Properly Made.

Plaintiff in error has not made its alleged constitutional question in a way which this Court can consider. The question sought to be made is that the Georgia blow-post law requiring railroad trains at grade crossings to blow the whistle and check in a certain manner, is an illegal attempt to regulate commerce between the States, in that it seriously obstructs the schedules of interstate trains.

The plea in vague terms, after setting forth the Commerce Clause of the Constitution, alleged "that the statute is a direct burden on and impedes the interstate traffic being done by this defendant, and impairs the usefulness of its facilities for such traffic."

Such general language as the amended answer contains fails to set out how compliance with this law interferes with interstate commerce, and fails to show how many such public grade crossings there were in the territory covered by this train; and this pleading is entirely consistent with the proposition that the grade crossing in question was the only public crossing in the territory named: and the answer fails to set forth how long a train will be delayed by checking up for these crossings and gives no data whatsoever which will enable the Court to determine whether the delay is serious or trifling.

The Court is not bound by the mere conclusion of the pleader that the statute is a burden on interstate commerce. The railway company claims that under a certain state of facts which exist on this particular railway, compliance with this blow-post law is an unreasonable burden on interstate commerce. Ought not the facts which sustain this claim be so explicitly pleaded as to enable the Court to determine for itself whether compliance with this law is an unreasonable burden? See Parham & Co. vs. Potts-Thompson Liquor Co., 127 Georgia, 303; Newkirk vs. Southern Railway Co., 120 Georgia, 1048.

After the foregoing plea was stricken, it was not competent for the railway company to offer evidence tending to show that compliance with this law was an unnecessary burden on interstate commerce. Aside from the fact that the facts proposed to be proved were vague and indefinite, there was no pleading in the Record which justified the proof, and under the law of Georgia, pleadings must be in writing. See the decision of the Circuit Court of Appeals in the case at bar, holding that the striking of the amended answer rendered inadmissible this evidence; and see also the Georgia Code of 1895, Sections 4960 and 5049.

But in case the Court should consider the questions upon their merits, we will now discuss them.

INCIDENTAL EFFECT ON INTERSTATE COMMERCE DOES NOT VITIATE STATE LEGISLATION.

In Sherlock vs. Alling, 93 U. S., 99, the Court says:

"In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating upon all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution."

See also the case of Chicago, etc. R. R. vs. Solan, 169 U. S. 133, in which the Court uses the expression that police regulations by the States designed to protect persons and property in the management and operation of railroads "are rather to be regarded as legislation in aid of such commerce."

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DECISIONS RELIED ON BY PLAINTIFF IN ERROR NOT IN POINT.

Decisions in cases which deal with State legislation directly seeking to control interstate commerce are not in point here. The legislation in the case at bar is an aid to interstate commerce, not an obstruction. The decisions in the cases of Atlantic, etc. R. R. vs. Wharton, 207 U. S., 334; Mississippi Railroad Commission vs. Illinois Central R. R. Co., 203 U. S., 335; Cleveland, etc. R. R. vs. Illinois, 177 U. S., 514; and Illinois vs. Illinois, etc. R. R. Co., 163 U. S., 141, are all cases in which an attempt was made by State legislation to stop interstate trains at designated stations where the railroad had already provided reasonable local facilities, and such effort to stop through trains was held to be a direct attempt to regulate interstate commerce, and nothing else.

In the line of cases just cited, the attempt to stop all interstate trains at county seats or other stations was an attempt solely at the regulation of the schedules of the railroads. If those stations already had adequate service, the State's remedy was not to require through trains to stop, but to improve the service actually given to the stations sought to be aided, and it was justly held in the cases cited that such laws were mere attempts to fix arbitrary and unreasonable schedules for railroad companies. Such laws bore no relation to the public safety, health or morals, but were purely regulations of the railroads' traffic.

CASES WHICH CONTROL THE CASE AT BAR.

Cases which control the case at bar are as follows:

Smith vs. Alabama, 124 U. S., 465, which decision sustained a statute of Alabama requiring locomotive engineers to be examined and licensed.

Crutcher vs. Kentucky, 141 U. S., 47, which decision, in showing the extent to which the State can control in the exercise of its police powers, the operation of railroads, uses the following language:

"It is also within the undoubted province of the State legislature to make regulations with regard to the speed of railroad trains in

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the neighborhood of cities and towns; with regard to the precautions to be taken in regard to the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and, generally, in regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce."

Lake Shore R. R. vs. Ohio, 173 U. S., 286, in which a statute of Ohio was sustained which required every railroad company operating within the State to cause three of its regular passenger trains each way daily to stop at every village containing over three thousand inhabitants, long enough to receive and discharge passengers.

Gladson vs. Minnesota, 166 U. S., 427-430, in which a law of Minnesota requiring all trains running between points within the State, to stop at county seats, was upheld, and the Court in the course of the decision, uses the following language:

"It (the State legislature) may prescribe the location and the plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience and comfort of the passengers and of the public.

Hennington vs. Georgia, 163 U. S., 300, involved the statute of Georgia which made it unlawful to run any freight trains on Sunday, and this law was sustained as applicable to interstate trains. The effect of this law was to cause the stoppage for one-seventh of the week of all freight trains within the borders of Georgia, and it can be readily seen that the effect was much farther reaching in the way of interfering with interstate commerce than the slight checking required in the case at bar.

Erb vs. Morasch, 177 U. S., 584, involved a municipal ordinance of Kansas City, Kansas, which restricted the speed of all trains within its limits to six miles per hour, whether the same were interstate trains or interstate trains; and the objection there made that the municipal ordinance sought to and did regulate interstate commerce, was held not well founded. The Supreme Court of the United States held that

"A regulation by a city of the speed of railroad trains within the city limits is not, as to interstate trains, an unconstitutional regula-

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tion of interstate commerce,—at least until Congress takes action in the matter."

The blow-post law of Georgia, instead of obstructing commerce, makes that commerce safer and more advantageous to the public. The commerce which the United States wishes to promote is not the commerce which takes or endangers human life, but is that commerce which is conducted reasonably and which promotes the public safety, health and welfare.

PRACTICAL OPERATION OF GEORGIA STATUTE.

The blow-post law of Georgia is found in Sections 2220, 2221, 2222, 2223, 2224, 2225 and 2226 of the Georgia Code of 1895. It forms one scheme for the maintenance of public highways at grade over railroads, and for the operation of trains over the same. Section 2222, which is quoted in the Record and in the briefs in this case (and is quoted in our brief further on), requires as to all trains going over the public highway, grade crossings of the State, first: that the whistle of the locomotive be blown from a post located four hundred yards from such highway crossing until the crossing is reached; and second; that the engineer, beginning at the blow-post four hundred yards away from the crossing, must begin to check his train and keep checking it so as to stop in time should any person or thing be upon the crossing. He is not required to bring his train to a stop.

There is no complaint of the requirement that the whistle be blown.

How does the checking requirement interfere with interstate commerce? The engineer is not required to bring his train to a stop, nor does this law fix any number of miles per hour as the speed at which he shall run between the blow-post and the crossing. If the crossing is approached from a point where there is a full view on both sides of the road, then little or no checking is required of the engineer. The stopping is required only in the event that some person or thing should be upon the crossing. If the crossing is approached from a sharp curve or other point where the engineer would have no chance to protect persons or things upon the crossing until almost upon it, then necessarily much more checking would be required. It is entirely consistent with this statute that trains could run at full speed over these crossings in the great majority of instances, where the engineer could see that the way was clear.

REASONS GIVEN WHY STATE CAN REGULATE SPEED ON CROSSINGS. COMPARISONS WITH SIMILAR LAWS.

If this law worked a serious hardship upon the railroad companies, they could easily construct underground or overhead crossings in most instances, and thus reduce these grade crossings to a minimum.

Grade crossings are recognized everywhere as dangerous, and some States have abolished them altogether. See the statute of Pennsylvania, quoted in Pennsylvania R. R. vs. Braddock, 152 Penn. State, 116, and cited in brief of plaintiff in error.

If the State can abolish grade crossings altogether, can it not impose upon railroads using such dangerous places any reasonable condition before allowing their use? Does not the power to altogether prohibit include the power to regulate? Could not the State require that at every grade crossing there should be a gate and a flagman? Is the law in this case any more unreasonable than the requirement of a gate and flagman?

What difference is there in principle between a railroad track and a public highway used by pedestrians and vehicles, and a grade crossing of two railroads? The law is almost universal that every railroad must bring its trains to a complete stop before running over another railroad track crossed at grade. Surely no attack could be made upon the provisions of such a law applying to two railroads crossing at grade.

And yet there is as much danger of collisions between railroad trains and pedestrians and vehicles at highway crossings, as at crossings of two railroads.

MORE SUGGESTIONS SHOWING REASONABLENESS OF THIS LAW, AND A SUMMING UP OF THE AUTHORITIES.

This case deals only with the civil liability of the railroad for an injury on a crossing. Could not the State, as a condition of allowing railroads to run over such highway crossings, impose an absolute liability in every case for injury?

If the State can require locomotive engineers to be examined and licensed before running interstate trains, as in Smith vs. Alabama, 124 U. S., 465; if the State can require interstate trains to lie absolutely idle one day out of seven, as in Hennington vs. Georgia, 163 U. S., 299; if a municipality can regulate the speed of an interstate train to six miles per hour, as in Erb vs. Morasch, 177 U. S., 584; if the State can regulate the speed of railroad trains in the neighborhood of cities and towns, and can regulate the manner of their approach to bridges, tunnels, deep cuts and sharp curves, as in Crutcher vs. Kentucky, 141 U. S., 47,—can the State not, in the conservative exercise of its police power, protect life on the highway by requiring a reasonable amount of checking and signalling?

PUBLIC SAFETY ON GRADE CROSSINGS DEMANDS AS MUCH DILIGENCE FROM INTERSTATE AS FROM INTRA-STATE TRAINS.

An interstate train is as dangerous to life and property in running over a grade crossing as any other train. The reasons which call for this statute of Georgia apply equally as much to one class of trains as to the other.

GEORGIA CASES EXPLAINED AS TO EFFECT OF BLOW-POST LAW.

Judge Burns, in his dissenting opinion in the Circuit Court of Appeals, upon the decision of this case, quoted a remark made by Chief Justice Simmons, of Georgia, in the case of Central of Georgia Ry. Co. vs. Hall, 109 Georgia, 367, to the effect that trains could not observe literally the blow-post law and make their schedules.

Judge Simmons stands alone among the judges of Georgia in his opinion about the hardship of the blow-post law. The blow-post law has been before that tribunal in scores of cases and no other judge, so far as we can ascertain, has ever questioned its wisdom or commented upon its hardship.

In the recent case of Grizzle vs. Southern Railway Company, 131 Georgia, 287, which was the very last decision upon this subject rendered, and decided in 1908, the Supreme Court of Georgia sustained the constitutionality of this law against the attack which is now being made upon it, and held that it was no interference with interstate commerce.

In Brunswick and Western R. R. vs. Hoover, 74 Georgia, 428, Chief Justice Jackson, in alluding to this law and explaining its provisions, said:

"Not only, therefore, is it negligence, but negligence of the grossest and gravest character, not to comply with these statutory enactments to preserve human life on the public highway, when that highway crosses the railroad track; so grave that it is made criminal not to comply with these enactments."

The blow-post law was again enforced in the case of Williams vs. Southern Railway Co., 126 Georgia, 710; Central of Georgia Ry Co. vs. North, 129 Georgia, 106; and Western and Atlantic Railroad vs. York, 128 Georgia, 687.

These decisions show that the Supreme Court of Georgia has not given the remarks of Judge Simmons the effect claimed for them by counsel for plaintiff in error.

In conclusion, we say that a close inspection of the Act shows that it does not require a train to stop at a crossing, but only to check. It only requires checking so as to be able to stop in time should any person or thing be on the crossing. In the great majority of instances, the blowing of the whistle will keep the public crossing clear of persons, and no checking whatever will usually be required. In other words, this law makes the checking, and its extent, depend upon the circumstances of danger attending the case.

ARGUMENT FOR DEFENDANT IN ERROR.

Constitutional Questions Not Properly Made.

It is doubtful whether the plaintiff in error has made its questions in such a way that this court can consider them.

The question which the defendant is attempting to have decided is whether the Georgia statute contained in Section 2222 of the Georgia Code of 1895 is void as imposing an unauthorized State burden on interstate commerce.

This law is applicable to railroad companies and reads as follows:

"There must be fixed on the line of said roads, and at the distance of four hundred yards from the center of each of such road crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road."

The road crossings which are referred to in this statute mean public, grade crossings on all the public roads of the State.

The road in the case at bar was of that description; and not only so, but the railroad company in this case has recognized the blow-post law and acquiesced in it by erecting blow-posts, as this law requires, on each side of the crossing in question.

The defendant, by a plea which appears in the record, undertakes to set up in general, in vague terms, some supposed interference of the blow-post law with interstate commerce. The material portions of the amended answer setting up this contention are as follows:

(After first setting up that the train which caused the injury was engaged in interstate commerce.) "Defendant further shows that the statute of Georgia, which is in these words, to-wit: (Here citing the blow-post law which we have heretofore quoted), the violation of which plaintiff alleges as the negligence in this case, is and was inoperative as to defendant's train, which plaintiff alleges injured her, for the reason that it is in violation of Section 8, Article First, of the Constitution of the United States, which gives to Congress the right to 'regulate commerce with foreign nations, and among the several States

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and with the Indian tribes.' Your defendant further shows that the statute of Georgia is not a reasonable regulation of the police power of the State to secure the safety of persons, but that the statute is a direct burden on and impedes the interstate traffic being done by this defendant, and impairs the usefulness of its facilities for such traffic. Defendant further shows that it is impossible to observe said statute and carry the mails as defendant is required to carry them under the contract it has with the government; and it is likewise impossible to do an interstate business, and at the same time comply with the terms of said statute.

"Wherefore, it says that said statute is inoperative as to it, and it should not be required to comply with the same on its interstate line of railroad."

This attack upon the constitutionality of the blow-post law is vague and indefinite in the following particulars:

It fails to set out how a compliance with this law interferes with interstate commerce.

It fails to allege how many public crossings there are in the path of this train between the South Carolina line and Atlanta.

It is entirely consistent with this pleading that the public crossing in question was the only public crossing in the territory named.

It fails to set forth just how long a train will be delayed by undertaking to check up for each of these crossings; it gives no data whatsoever which will enable the Court to determine whether the delay caused to a train by a compliance with this law is serious or trifling.

The Court is not bound by a conclusion of a pleader that the statute is a burden on interstate commerce. The rule in pleading here is analogous to the pleading in cases of fraud. A general charge of fraud in a pleading always counts for nothing; the particulars constituting the fraud must be set forth.

It will be borne in mind that the plaintiff in error here is claiming that a certain state of facts makes compliance with this blow-post law a burden on commerce. Should not the state of facts be so clearly and explicitly pleaded as to enable the Court to determine for itself whether an unreasonable burden is imposed on interstate commerce?

In Parham & Co. vs. Potts-Thompson Liquor Co., 127 Georgia, 303, the rule is thus stated:

"An averment in a pleading, that a named statute is 'unconstitu-

tional and void," is too vague and indefinite to raise any question for determination." See also a similar ruling in Newkirk vs. Southern Railway Company, 120 Georgia, 1048.

It would not seem to cure the objection that the particular clause of the Federal Constitution which is claimed to be violated is specified; it should be shown how and wherein the State law operates to violate this clause of the Federal Constitution, especially if the violation depends upon a certain condition or state of facts, as is claimed in this case.

After this plea was stricken, plaintiff in error offered in evidence the testimony of the witness Dewberry, and counsel for plaintiff in error, upon objection being made to Dewberry's evidence, proposed to prove by Dewberry the following facts:

"I expect to prove that between the South Carolina line and Atlanta, there are practically one hundred road crossings, or between eighty-five and one hundred public road crossings; that the distance is one hundred and one miles; that the crossings in some localities are very close together, and within a few hundred yards of each other, and at others further apart, but on the average making a crossing to the mile almost. We expect to show further, that to observe the statute and check and keep checking so as to have a train under control, and to stop should any person or thing be on the crossing, it would consume from five to ten minutes for each crossing, dependent, of course, upon the weight and length of the train, and the grade; but it would make an average of seven or eight minutes. We wish to show that this train was made up and known as No. 39, the vestibule train which runs from the City of Washington, though the States of Virginia, North Carolina, South Carolina and Georgia; that it was carrying passengers from one State to another, also carrying an express car with freight on it, from one State to another. We wish and expect to show that obedience to that Crossing Act would hinder, and practically prevent interstate business being done by the defendant railroad. We wish to show the condition I have just stated all existed at the time this accident occurred, on the 11th of Ocober, 1903."

Outside of the fact that there was no pleading to justify this proposed proof, we say that it was too uncertain and indefinite to be the basis of a legal exception. The counsel said he proposed to prove that there were between eighty-five and one hundred public crossings in this territory. He should have been exact in his offer. He said that he expected to show on the average of a crossing to the mile,

"almost." He should have been more exact in this. He said that he expected to show that to check and have the train under control for every crossing would consume from five to ten minutes for each crossing, dependent upon the weight and length of the train, and the grade. He should have been more exact in this.

The Circuit Court of Appeals, in the decision rendered in this case, declined to consider this offer of proof as a ground for exception, and uses the following language:

"The objection was sustained, testimony excluded and exception noted. We are of the opinion that there was no error in the action of the Court in sustaining the objection, as the testimony was not properly admissible in the absence of pleading to support it. This view seems to have obtained with counsel for defendant below, as evidenced by the amendment filed and heretofore discussed."

In Georgia, written pleadings are required. By Section 4960 of the Georgia Code of 1895, it is provided:

"All suits in the Superior Courts for legal or equitable relief, or both, shall be by petition to the Court, signed by the plaintiff or his counsel, plainly, fully, and distinctly setting forth his charge, ground of complaint and demand, and the names of the persons against whom process is prayed."

By Section 5049 of the same Code, it is provided:

"The defendant may, by proper pleadings, raise issues of law, or of fact, legal or equitable, or both. All issues of law shall be raised by demurrer. All issues of fact shall be raised by plea or answer, which may be of a dilatory nature, or to the merits."

Thus it will be seen that inasmuch as written pleadings are required, the defendant had no basis for any evidence upon this alleged constitutional objection, after its plea had been stricken.

But in case the Court should hold that the questions sought to be raised by the plaintiff in error are properly made, either in the amended answer or in the proposed evidence, we will discuss the question now upon its merits.

ARGUMENT ON MERITS.

Incidental Or Remote Effect On Interstate Commerce Does Not Vitiate State Legislation.

The Constitution of the United States gives Congress the right "to regulate commerce with foreign nations and among the several States, and with the Indian tribes." (Section 8, Article 1, Constitution of the United States.)

In Sherlock vs. Alling, 93 U. S., p. 99, the Court say:

"In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislation upon all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution."

In the case of Chicago, etc. R. R. vs. Solan, 169 U. S., p. 133, the Court say:

"The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits. Such are the grounds upon which it has been held to be within the power of the State to require the engineers and other persons engaged in the driving and management of all railroad trains passing through the State to submit to an examination by a local board as to their fitness for their position; or to prescribe the mode of heating passenger cars in such trains."

SOME PREVIOUS DECISIONS NOT IN POINT.

Decisions on State Legislation Which Directly Sought to Control Commerce, Not In Point Here. Legislation In Case at Bar, Is An Aid To Interstate Commerce.

It will be seen from the two decisions just quoted, first, that the police power of the State may be exercised, even though it may incidentally and to some extent affect interstate commerce; second, that so long as Congress has not legislated upon a particular subject, State legislation of a reasonable kind is in order and not unconstitutional; and, third, that the rightful exercise of police power by the State, even though it may incidentally affect commerce, is to be regarded as legislation in aid of such commerce.

Many cases have been decided by the Supreme Court of the United States which more than cover this case. It has been held that legislation by a State, which directly undertakes to regulate commerce, is void; while other legislation, which incidentally affects it equally as much as a direct regulation of it, has been held valid. In Atlantic, etc. R. R. vs. Wharton, 207 U. S., p. 334 the Court say:

"It hence arises that any command of a State, whether made directly or through the instrumentality of a railroad commission, which orders, or the necessary effect of which is to order, the stopping of an interstate train at a named station or stations, if it directly regulates interstate commerce, is void.

"It has been decided, however, that some orders which may cause the stoppage of interstate trains made by State authority may be valid if they do not directly regulate such commerce."

Counsel for the plaintiff in error in his brief relies almost wholly on the line of decisions of which the Wharton case, just quoted, is a specimen. In the Wharton case, the railroad commission of South Carolina required the railroad company to stop on signal two of its through fast mail interstate trains at a small station in South Carolina, which had quite a number of local trains each day, and this rule of

the commission was held to be an unreasonable burden upon interstate commerce.

The same ruling was made in the case of Mississippi Railroad Commission vs. Illinois Central R. R. Co., 203 U. S., p. 335. In the Mississippi case, the facts were practically identical with the South Carolina case.

The case of Cleveland, etc. R. R. vs. Illinois, 177 U. S., p. 514, cited by plaintiff in error, held to be invalid a statute which required all through interstate commerce trains to stop at every county seat when adequate train service had already been provided for local traffic.

The same is true of the State of Illinois vs. Illinois, etc. R. R. Co., 163 U. S., p. 141. The line of decision just quoted, holding that an attempt to make through interstate trains stop at a designated station is an unreasonable burden upon interstate commerce, is easily distinguishable from the case at bar. In the cases cited the remedy of the State was to require the railroad to give adequate train service with its other trains to the various stations at which it was sought to make the through trains stop. If the service was inadequate, it was not the proper remedy to cause the stoppage of the through trains, but to improve the service of the other trains. As the Court said in the Wharton case (cited above):

"Fault is found here with the character of some of the local trains in that the appointments thereof were not up to a sufficiently high standard. These deficiences are remediable by other means than the stoppage of the two trains in question."

To attempt to stop all through trains at county seats or other points is sheer tyranny, if those stations have already adequate service. After adequate train service is given, it can neither aid the public health, safety, morals or convenience, to require other trains to stop, and it has been justly held that such laws are mere attempts to fix arbitrary and unreasonable schedules for railroad companies. In effect, all that such laws can accomplish is to regulate interstate commerce. Such laws bear no relation to the public safety, health or morals. They are purely and simply regulations of commerce.

CASES WHICH CONTROL THE CASE AT BAR.

The case at bar belongs to an entirely different class.

In Smith vs. Alabama, 124 U. S., p. 465, the statute of Alabama requiring locomotive engineers to be examined and licensed, was held not to be a regulation of interstate commerce even as applied to railroads having interstate lines, and the ruling of the court is thus summed up in the third head-note:

"Such statute, so far as it affects transactions of commerce among the States, does so indirectly, incidentally and remotely, and not so as to burden or impede them; and in the particulars in which it touches those transactions at all, it is not in conflict with any enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence."

We may remark in this connection that Congress has not enacted any legislation which regulates the operation of interstate trains over grade crossings. It is manifestly one of those subjects in which the State is left free to enact its own laws.

In the case of Crutcher vs. Kentucky, 141 U. S., 47, the Court uses the following language, which not only in its reasoning, but in its illustrations, squarely covers the case at bar:

"But whilst it is only such things as are clearly injurious to the lives and health of the people that are placed beyond the commercial power of Congress, yet when that power or some other exclusive power of the Federal Government is not in question, the police power of the State extends to almost everything within its borders; to the suppression of nuisances; to the prohibition of manufactures deemed injurious to the public health; to prohibition of intoxicating drinks, their manufacture or sale; to the prohibition of lotteries, gambling, horse-racing or anything else that the legislature may deem opposed to the public welfare (citing authorities). It is also within the undoubted province of the State Legislature to make regulations with regard to the speed of railroad trains in the neighborhood of *cities and towns;* with regard to the precautions to be taken in regard to the approach of such trains to *bridges, tunnels, deep cuts and sharp curves,* and, generally, in regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce. Such regulations are eminently local in their character, and in the absence of congressional

regulations over the same subject, are free from all constitutional objections, and unquestionably valid."

If, as the Court says in the Crutcher case, the Legislature can regulate the speed of trains in the neighborhood of cities and towns, and can require the precautions to be taken in approaching bridges, tunnels, deep cuts and sharp curves, can it not equally regulate its speed and manner of approaching dangerous grade crossings?

In Lake Shore R. R. vs. Ohio, 173 U. S., p. 286, a statute of Ohio which required every railroad company operating within the State to cause three of its regular passenger trains each way daily to stop at every village containing over three thousand inhabitants long enough to receive and let off passengers, was held to be a valid law, and not an improper regulation of interstate commerce.

In Gladson vs. Minnesota, 166 U. S., pp. 427 and 430, a law of Minnesota requiring all trains running between points within the State to stop at county seats, was upheld, and the Court, in the body of the opinion, use this language, which is controlling in the case at bar:

"The principles of law which govern this case are familiar, and have often been affirmed by this Court. A railroad corporation created by a State is for all purposes of local government a domestic corporation, and its railroad within the State is a matter of domestic concern. Even when its road connects, as most railroads do, with railroads in other States, the State which created the corporation may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. It may prescribe the location and the plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience and comfort of the passengers and of the public. All such regulations are strictly within the police power of the State. They are not in themselves regulations of interstate commerce; and it is only when they operate as such in the circumstances of their application, and conflict with the express or presumed will of Congress exerted upon the same subject, that they can be required to give way to the paramount authority of the Constitution of the United States."

In the case of Hennington vs. Georgia, 163 U. S., p. 300, the question involved the validity of Georgia's statute, making it unlawful to run any freight train on Sunday. The effect of this statute was

absolutely to shut off all interstate trains for a period of twenty-four hours. The delay and stoppage caused by such a law was infinitely greater than the slight and incidental slowing up and checking for grade crossings; and yet this law was sustained in the Hennington case as a valid exercise of the police power of the State of Georgia, and it was held that the incidental effect upon commerce did not render the law void.

A case which covers this case absolutely is that of Erb vs. Morasch, 177 U. S., p. 584, in which the question involved was a municipal ordinance of Kansas City, Kansas, which restricted the speed of all trains within its limits to six miles per hour, whether the same were interstate or intrastate trains. The objection made is the identical one made in the case at bar, to-wit: that to cause the speed to slow down interfered with the rapid transit of interstate trains, and thus interfered with the carriage of the mails and of interstate commerce. The Supreme Court of the United States, ruled that "a regulation by a city of the speed of railroad trains within the city limits is not, as to interstate trains, an unconstitutional regulation of interstate commerce,—at least until Congress takes action in the matter."

There is not a particle of difference in principle between the case at bar and Erb vs. Morasch. To require the train to slow up for a grade crossing no more interferes with interstate commerce than to bring it down to a speed of six miles per hour in every municipality through which it might pass. If one city could pass such an ordinance, all cities could pass it. There are doubtless nearly as many villages, towns and cities in the various States as grade crossings. The principle which lies at the bottom of the decisions sustaining these laws is that they are intended to promote the public safety, and are not primarily regulations of interstate commerce, and only affect it incidentally and remotely. In other words, as the Court said in the Solan case, such regulations of the State are in aid of commerce. They make commerce safe and more advantageous to the public. The commerce which the United States wants to promote is not the commerce

which takes human life or scatters pestilence, but the commerce which is conducted reasonably, and which promotes the public safety, health and welfare. Therefore, such regulations, which save life, health and morals, aid commerce.

PRACTICAL OPERATION OF GEORGIA STATUTE.

To come now to the exact way in which the blow-post law of Georgia operates: What is known as the blow-post law of Georgia is found in Sections 2220, 2221, 2222, 2223, 2224, 2225 and 2226 of the Georgia Code of 1895. It forms one scheme for the maintenance of public highways at grade over railroads, and of the operation of trains over the same. Section 2220 requires "all railroad companies shall keep in good order at their expense public roads or private ways established pursuant to law where crossed by their several roads, and build suitable bridges and make proper excavations or embankments according to the spirit of the road laws."

Section 2221 requires that such crossings include the width of land on both sides of the road allowed by charter or appropriated by the company therefor, and for as many feet beyond, each way, as is necessary for a traveler to get on or off the cars safely and conveniently.

Section 2222 is the law in question, and we have already quoted it.

This Act was passed in 1852, long before any railroad now operating in Georgia acquired any franchise therein. The Georgia Railroad and Banking Company, and the Central Railroad and Banking Company, were then in existence, but neither are now operating under their franchises, and lessees are in posession.

Therefore, every railroad company in Georgia takes its franchise and its right to operate subject to the provision of this law, which has been sustained and applied by the Supreme Court of Georgia in many cases.

A full history of this statute will be found in Southern Railway vs. Combs, 124 Georgia, p. 1004. The cause for the passage of this law on January 22, 1852, was a shocking accident which occurred on December 14, 1851, at a grade crossing in Monroe county, in which a carriage containing a lady and four children, driven by a negro slave,

was run into by a train of the Macon and Western Railroad Company, and two of the children and the driver killed, and the other occupants seriously injured. The cases growing out of this accident were known as Railroad vs. Davis, 18 Ga., 679; Railroad vs. Wynn, 19 Ga., 440, and Railroad vs. Wynn. 26 Ga., 250.

The requirements of the Act, so far as the case at bar is concerned, are (first) that the whistle of the locomotive be blown continuously from a post located four hundred yards from the crossing until the crossing is reached, and by Section 2224, if the crossing is in an incorporated town, a continuous ringing of the bell for the same distance is substituted for the blowing of the whistle. (Second) Beginning at the blow-post four hundred yards away, the engineer must begin to check his train and keep checking so as to stop in time should any person or thing be upon the crossing. He is not required to bring his train to a stop.

Surely the requirement that the whistle be blown or the bell rung cannot interfere with interstate commerce.

How does the checking requirement interfere with interstate commerce?

The engineer is not required to bring his train to a stop, nor does the law fix any number of miles per hour as the speed at which he shall run between the blow-post and the crossing. If the crossing is approached from a point where there is a full view on both sides of the road, then little or no checking is required of the engineer. The stopping is only required in the event any person or thing should be upon the crossing. If the crossing is approached from a sharp curve where the engineer would have no chance to protect the person or vehicle upon the crossing, until almost upon it, then necessarily much more checking would be required.

It is entirely consistent with the terms of this statute, that trains can run at full speed over crossings in the great majority of instances.

REASONS GIVEN WHY STATE CAN REGULATE SPEED ON CROSSINGS. COMPARISONS WITH SIMILAR LAWS.

Is it not within the power of the State to require certain measures of diligence on the part of those operating trains when passing over dangerous places like grade crossings?

If this law worked such a hardship upon the railroads, they could easily construct underground or overhead crossings whenever practicable, and thus reduce these grade crossings to a minimum. Really, this would be best for the railroads and for the public.

To maintain these grade crossings is a most dangerous undertaking, and is so recognized everywhere, and some States have abolished grade crossings altogether. See the statute of Pennsylvania, quoted in Pennsylvania R. R., vs. Braddock, etc. R. R., 152 Penn. State, 116, and see the statute of Connecticut, quoted in the case of the town of Westbrook, 57 Conn., p. 95, both of which are cited on page 45 of brief of plaintiff in error.

If the State can abolish grade crossings altogether, can it not impose upon the railroads using such dangerous places almost any conceivable condition before allowing their use? The power to altogether prohibit certainly includes the power to regulate.

The time doubtless will come when if grade crossings are to be maintained at all, there will be gates and flagmen stationed at every crossing. Could it be doubted that a law requiring a gate or flagman would be a valid exercise of the State's police power?

Again, what is the difference in principle between a grade crossing over a railroad track upon which pedestrians and vehicles pass, and a grade crossing of two railroads? The law is almost universal that every railroad must bring its trains to a complete stop before running over another railroad track crossing at grade. Practically every State has a law requiring each company to come to a complete stop under such circumstances.

See Georgia Code of 1895, Section 2234 which provides as follows:

"Whenever the tracks of separate and independent railroads cross each other in this State, all engine drivers and conductors must cause the trains which they respectively drive and conduct to come to a full stop within fifty feet of the place of crossing, and then to move forward slowly. The train of the road first constructed and put in operation shall have the privilege of crossing first."

Would anybody attack the provisions of this law as an interference with interstate commerce? And yet it is easy to conceive of a situation where there might be such a number of these grade crossings as to interfere with the speed of trains. Such a provision is in the interest of public safety, and commerce would not be hurt, but would benefit by it.

There is no more danger of collision at a point where two railroads cross each other than where a dirt road crosses a railroad. In one case the danger is that of colliding with another train. In the other case it is that of colliding with pedestrians or vehicles of various kinds.

MORE REASONS, AND A SUMMING UP OF THE ARGUMENT.

Inasmuch as we are dealing only with the civil side of this blow-post law, would it not be competent for the State to enact that in every case where a railroad crosses a highway at grade, that the railroad shall pay all damages done to persons or property upon that crossing? The law which is the subject-matter of attack here does not itself prohibit the running of trains over these crossings in violation of law. So far as the case at bar is concerned, it merely fixes a civil liability. Laws have been sustained which absolutely make railroads liable under certain circumstances irrespective of negligence. The common law liability of the carrier of freight makes him an insurer. Nothing excuses him except the act of God or the public enemy.

It being within the power of the State to abolish grade crossings altogether, surely the State, as a condition of allowing the railroads to maintain them, can require them to submit to reasonable regulations, and one of these conditions could be the creation of a liability for injuries occurring upon such crossing.

To sum up the question: If the State can regulate the operation of interstate railroads by requiring locomotive engineers to be examined and licensed before they run, as in the Smith case from Alabama, 124 U. S., p. 465; if the State can require interstate trains to lie absolutely idle one day out of seven, as in Mennington vs. Georgia, 163 U. S., p. 299; if a municipality can regulate the speed of an interstate train to six miles per hour, as in Erb vs. Morasch, 177 U. S., p. 584; if, in the language of the Court, in Crutcher vs. Kentucky, 141 U. S., p. 47, States can pass laws

"With regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in regard to the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and generally, with regard to all operations in which the

lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce;" and if, as stated by the Court in Gladson vs. Minnesota, 166 U. S., p. 430, the State may "prescribe the location and the plan of construction of the road, the rate of speed at which the trains shall run," and if, as is admitted in the brief of counsel for plaintiff in error, the State can prohibit grade crossings altogether; if the law can require trains of railroads which cross each other at grade to come to an absolute stop,—can the State not, in the conservative exercise of its police power, protect life and property upon highway crossings at grade, by simply requiring a reasonable degree of checking and signalling?

Is it not manifest that the primary object of this law being the public safety, that if there is any effect upon interstate commerce, it is only incidental and remote? Is it not manifest that the law is designed to protect lift and property, and is not intended directly to regulate commerce in any shape, manner or form?

PUBLIC SAFETY ON GRADE CROSSINGS DEMANDS AS MUCH DILIGENCE FROM INTERSTATE AS FROM INTRASTATE TRAINS.

An interstate train or a through mail train is as dangerous in going over a public crossing as any other train. Surely, there is nothing unreasonable in the Georgia law which makes the blow-post law apply to all trains. Any train will produce death or injury in causing a collision at a grade crossing. It was for this reason that in the Erb case, hereinbefore cited, the ordinance of the Kansas town, with regard to the speed of interstate as well as intrastate trains, was upheld. If the State law is to apply to any trains at grade crossings, it must necessarily apply to all. All trains which go at high speed are dangerous. How absurd it would be to enact a law which would say that local freight or passenger trains shall observe certain requirements of care at public crossings and thus save life, and at the same time, put no requirement upon interstate or mail trains in the way of speed or signals.

BLURRE

GEORGIA CASES EXPLAINED AS TO EFFECT OF BLOW-POST LAW.

In the trial of this case in the Circuit Court of Appeals, two of the circuit judges, Judges Pardee and Shelby, presided, and District Judge Burns, of Texas, made the third judge. The two circuit judges concurred in the opinion that the statute of Georgia was a valid exercise of the police power, from which District Judge Burns dissented.

Judge Burns based his dissent mainly upon a remark of Chief Justice Simmons, of Georgia, in the case of Central of Georgia Railway vs. Hall, reported in 109 Georgia, p. 367, in which case Judge Simmons used language to the effect that trains could not observe literally this blow-post law and make their schedules.

Judge Simmons is absolutely alone in his opinion about the hardship of this law among the various judges who have served upon the Supreme Court of Georgia. The blow-post law has been before that tribunal in scores of cases, and no other judge, so far as we can ascertain, has ever questioned its wisdom or commented upon its hardship.

In the recent case of Southern Railway vs. Grizzle, 131 Georgia, p. 287 (and which is the very last decision upon the subject) the Supreme Court of Georgia sustained the constitutionality of this law against the very same attack now being made upon it, and held that it was no interference with interstate commerce. Surely, this ruling in a case in which the identical question now before the Court was involved, should have more weight than the mere remark of Judge Simmons in the Hall case, especially as Judge Simmons wound up in the Hall case with the following:

"Still, it (the blow-post law) is the law of the land, and the Courts must enforce it, however hardly it may work upon the business interests of the country if it should be observed, or upon the railroads when they violate it."

Other judges of the Supreme Court have concurred in the enforcement of this law, and thought that it was a wise one. Chief Justice Jackson, in the case of Brunswick & Western R. R. vs. Hoover, 74 Georgia, p. 428, in alluding to this law and explaining its provisions, said:

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"Not only, therefore, is it negligence, but negligence of the grossest and gravest character, not to comply with these statutory enactments to preserve human life on the public highway, when that highway crosses the railroad track; so grave that it is made criminal not to comply with these enactments."

The blow-post law was again enforced in the case of Williams vs. Southern Railway Company, 126 Georgia, p. 710; and again in the case of Central of Georgia Railway Company vs. North, 129 Georgia, p. 106, and again in Western and Atlantic Railroad vs. York, 128 Georgia, p. 687.

We will not cite further cases in which this law has been enforced. We submit that the remarks of Judge Simmons, in the Hall case, that it was impossible for the railroads to transact the business of the country and obey this law, are not warranted by a consideration of the Act itself. The Act does not require a train to stop at a crossing, but only to check. It only requires checking so as to be able to stop in time "should any person or thing be upon the crossing." Surely, common humanity would require that the train should be checked or stopped if any person or thing is upon the crossing, or in danger.

In the great majority of instances, the blowing of the whistle four hundred yards away will serve to keep persons at a safe distance from the crossing. In the great majority of instances, there are no persons on or near the crossing, and very little, if any, checking is required. In many instances, the view on either side of the railroad is not obstructed, and the engineer can readily see that it will be impossible for anything to get upon the crossing before his train passes. He is only required to have his train in a condition of checking when somebody is on or near the crossing, in a condition of danger, and should not the law protect human life under such circumstances?

Respectfully submitted,

Reuben R. Arnold

Attorneys for Defendant in Error.

SOUTHERN RAILWAY COMPANY *v.* JOSEPHINE KING.

SAME *v.* INEZ KING.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Nos. 140, 141. Argued April 6, 7, 1910.—Decided May 16, 1910.

The right to regulate interstate commerce is exclusively vested in Congress, and the States cannot pass any law directly regulating such commerce; but the States may, in the exercise of the police power, pass laws in the interest of public safety which do not interfere directly with the operations of interstate commerce.

The constitutionality of a state statute regulating operation of railroad trains depends upon its effect on interstate commerce; and, in the absence of congressional regulation on the subject, States may make reasonable regulations as to the manner in which trains shall approach, and give notice of their approach to, dangerous crossings, so long as they are not a direct burden upon interstate commerce.

One who would strike down a statute as unconstitutional must show that it affects him injuriously and actually deprives him of a constitutional right.

Proof must conform to the allegations and without proper allegations testimony cannot be admitted.

A pleading must state facts and not mere conclusions; and the want of

essential definite allegations renders a pleading subject to demurrer. This general rule is also the practice in Georgia.

General statements that a statute is in violation of the commerce clause of the Federal Constitution, is a direct burden on interstate commerce, and impairs the usefulness of the pleader's facilities for that purpose, are mere conclusions and not statements of the facts which make the operation of the statute unconstitutional, and do not raise any defense to a cause of action based on a violation of such statute.

160 Fed. Rep. 332, affirmed.

THE facts, which involve the constitutionality of a statute of Georgia regulating the crossing of highways by railroad trains, are stated in the opinion.

Mr. John J. Strickland, with whom *Mr. A. P. Thom* and *Mr. Hamilton McWhorter* were on the brief, for plaintiffs in error:

The amendment alleging that the Blow Post statute is void because a burden upon interstate commerce was in proper form and conformed to the laws of Georgia and properly raised the constitutional question. *S. F. & W. Ry.* v. *Hardin,* 110 Georgia, 433; *Brown* v. *State,* 114 Georgia, 60; *Sayor* v. *Brown,* 119 Georgia, 542.

When a constitutional question is not made or passed upon in the lower court, the court of review will not consider it, though afterward argued there. The reverse of the proposition is likewise true. *Butler* v. *Merritt,* 113 Georgia, 241; *Lafitte* v. *Burke,* 113 Georgia, 1000; *State* v. *Henderson,* 120 Georgia, 781; *Newkirk* v. *Sou. Ry. Co.,* 120 Georgia, 1048; *Parham* v. *Potts-Thompson Liquor Co.,* 127 Georgia, 303.

The evidence, offered and rejected by the court, properly raised the constitutional question. All that is required by the laws of Georgia is that the question shall be raised below, and be passed on directly or indirectly and appear in the record either in the pleadings, or the evidence, or other parts of the record. Cases cited *supra. Parham* v. *Potts-Thompson Liquor Co.,* 127 Georgia, 303; *S. F. & W. Ry. Co.* v. *Hardin,*

110 Georgia, 433; *Newman* v. *State*, 101 Georgia, 534; *Lafitte* v. *Burke*, 113 Georgia, 1000. Under the law of Georgia all objections to evidence not made are waived. *Jackson* v. *State*, 88 Georgia, 784; *Steed* v. *Cruise*, 70 Georgia, 168; *Christian* v. *State*, 86 Georgia, 430; *Rhinehart* v. *Blackshear*, 105 Georgia, 799; *Summers* v. *State*, 116 Georgia, 535.

Commerce among the States consists, among other things, in intercourse and traffic, including in these terms the transportation and transit of persons and property and the instrumentalities thereof. *Mobile County* v. *Kimball*, 102 U. S. 691; *McCall* v. *California*, 136 U. S. 104; *Williams* v. *Fears*, 179 U. S. 270; *Champion* v. *Ames*, 188 U. S. 321.

There is no reserved power in the States to, in any way, regulate interstate commerce. Where the apparent exercise of power has been upheld by the courts, the power was either the mere declaration of a common law duty as applied to the instrumentalities of interstate commerce or the exercise of some other reserved power not pertaining to commerce. Cooke's Commerce Clause of Fed. Const. 111, 124; *Western Union Tel. Co.* v. *Call Pub. Co.*, 181 U. S. 92; 3 Elliott on Railroads, 1156.

If the authority to regulate an interstate railroad train at a public crossing is embraced in the police power of a State, that authority must be so exercised as not to burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for the traffic. The police power of a State is not unlimited and is subject to judicial review, and when exercised in an arbitrary or oppressive manner, such laws may be annulled as violative of the rights protected by the Constitution. *Illinois Cent. R. R.* v. *Illinois*, 163 U. S. 154; *L. S. & M. S. R. R.* v. *State of Ohio*, 173 U. S. 285; see pp. 309 and 335; *Cleveland & Chicago R. R.* v. *St. Louis R. R.*, 177 U. S. 514; *Miss. R. R. Commission* v. *Ill. Cent.*, 203 U. S. 335; *Atlantic Coast Line* v. *N. C. Commission*, 206 U. S. 1; *Morgan Steamship Co.* v. *Louisiana Bd. of Health*, 118 U. S. 455; *Jacobson* v. *Massachusetts*, 197 U. S. 25; *Lawler* v. *Steele*,

152 U. S. 133; *Henderson* v. *New York*, 92 U. S. 259; *Lochner* v. *New York*, 198 U. S. 45; *Holden* v. *Hardy*, 164 U. S. 366; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Sinnot* v. *Davenport*, 22 How. 227; *Mo. Ry. Co.* v. *Harber*, 169 U. S. 613; *Dobbins* v. *Los Angeles*, 195 U. S. 223; *McLean* v. *Arkansas*, 211 U. S. 547.

Congress, alone, can deal with such interstate transportation and its non-action is a declaration that it shall remain free from burdens imposed by state legislation. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196.

Although it is expressly provided that the power of Congress to regulate shall be exclusive, it is obvious that in order to be effective, the exercise thereof must exclude the exercise of any conflicting power under authority of the State; inconsistent state legislation being to that extent superseded. Cooke's Commerce Clause of Fed. Constitution, 109; *Mobile County* v. *Kimball*, 102 U. S. 691; *Leisy* v. *Hardin*, 135 U. S. 100. Police power cannot control in a case like this. *Henderson* v. *Mayor of N. Y.*, 92 U. S. 259; *Jacobson* v. *Massachusetts*, 197 U. S. 25.

Federal control of commerce begins as soon as the subjects or operations of commerce are subjected to burdensome state legislation. Prentice & Eagan, p. 61; *Walling* v. *Michigan*, 110 U. S. 446; *Robinson* v. *Taxing District*, 124 U. S. 489; *Asher* v. *Texas*, 128 U. S. 129; *McCall* v. *California*, 139 U. S. 104; *Brennan* v. *City of Titusville*, 153 U. S. 289.

The statute under review is unconstitutional and void as to interstate railroads. There is no common-law duty on a carrier to check its trains at a crossing, so as to stop if any person or thing should be thereon, and there is no reserved power in a State to impose such burden on an interstate carrier.

The act as applied to through trains is unreasonable. *L. S. & M. S. R. R. Co.* v. *State of Ohio*, 173 U. S. 301.

The act in effect is to regulate an interstate carrier, and thus interstate commerce. *Brown* v. *Houston*, 114 U. S. 622; *Welling* v. *Missouri*, 91 U. S. 275; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691.

To regulate is to adjust by rule, method, or established mode; to direct by rule, or restriction; to subject to governing principles or laws. Webster's Int. Dict.

The effect of the statute is to burden, impede, and to impair the usefulness of the facilities of interstate carriers for such traffic. *Ill. Cent. R. R. Co.* v. *Illinois*, 163 U. S. 154; *Miss. R. R. Comm.* v. *Ill. Cent.*, 203 U. S. 346.

The statute is not observed, and the engineers are not prosecuted for its violation, though the statute so requires. Penal Code of Ga., § 517, provides he shall be punished as for a misdemeanor by § 2222 of the Civil Code.

The statute was passed before the days of interstate railroads; it was enacted by the State for the railroads of the State as they were then operated. Interstate carriers operate by virtue of an act of Congress passed since the day of the Georgia statute, and which had the effect to supersede the Blow Post statute of Georgia. Rev. Stat., § 5258.

The evolution of the business world has rendered obsolete the statute under review.

Mr. Reuben R. Arnold for defendant in error:

Plaintiff in error has not made its questions in such a way that this court can consider them.

The court is not bound by a conclusion of a pleader that the statute is a burden on interstate commerce. The rule in pleading here is analogous to the pleading in cases of fraud. A general charge of fraud in a pleading always counts for nothing; the particulars constituting the fraud must be set forth. *Parham & Co.* v. *Potts-Thompson Liquor Co.*, 127 Georgia, 303; *Newkirk* v. *Southern Railway Co.*, 120 Georgia, 1048.

The defendant may, by proper pleadings, raise issues of law, or of fact, legal or equitable, or both. All issues of law shall be raised by demurrer. All issues of fact shall be raised by plea or answer, which may be of a dilatory nature, or to the merits.

Inasmuch as written pleadings are required, the defendant had no basis for any evidence on this alleged constitutional objection, after its plea had been stricken out.

Incidental or remote effect on interstate commerce does not vitiate legislation. *Sherlock* v. *Alling*, 93 U. S. 99; *Chicago R. R.* v. *Solan*, 169 U. S. 133.

Decisions on state legislation directly seeking to control commerce, are not in point here. Legislation in case at bar is an aid to interstate commerce. Legislation by a State, which directly undertakes to regulate commerce, is void; while other legislation, which incidentally affects it equally as much as a direct regulation of it, has been held valid. The acts and orders construed in *Atlantic &c. R. R.* v. *Wharton*, 207 U. S. 334; *Miss. R. R. Comm.* v. *Ill. Cent. R. R. Co.*, 203 U. S. 335; *Cleveland R. R.* v. *Illinois*, 177 U. S. 514; *Illinois* v. *Illinois &c. R. R. Co.*, 163 U. S. 141, involved unreasonable burdens upon interstate commerce and are easily distinguished.

The case at bar belongs to an entirely different class, such as *Smith* v. *Alabama*, 124 U. S. 465; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Lake Shore R. R.* v. *Ohio*, 173 U. S. 286; *Gladson* v. *Minnesota*, 166 U. S. 427, 430; *Hennington* v. *Georgia*, 163 U. S. 300; and see *Erb* v. *Morasch*, 177 U. S. 584, holding that "a regulation by a city of the speed of railroad trains within the city limits is not, as to interstate trains, an unconstitutional regulation of interstate commerce,—at least until Congress takes action in the matter."

The Blow Post law was passed in 185[illegible] and every railroad company in Georgia takes its franchise and its right to operate subject to the provision of this law, which

has been sustained and applied by the Supreme Court of Georgia in many cases. A full history of this statute will be found in *Southern Railway* v. *Combs*, 124 Georgia, 1004; *Railroad* v. *Davis*, 18 Georgia, 679; *Railroad* v. *Wynn*, 19 Georgia, 440, and *Railroad* v. *Wynn*, 26 Georgia, 250.

It is entirely consistent with the terms of this statute, that trains can run at full speed over crossings in the great majority of instances.

It is within the power of the State to require certain measures of diligence on the part of those operating trains when passing over dangerous places like grade crossings. If this law works a hardship upon the railroads, they can construct underground or overhead crossings.

To maintain grade crossings is dangerous and is so recognized everywhere; some States have abolished grade crossings altogether. See *Railroad* v. *Braddock R. R.*, 152 Pa. St. 116; *Westbrook's Appeal*, 57 Connecticut, 95.

If the State can abolish grade crossings altogether it can impose upon the railroads using such dangerous places almost any conceivable condition before allowing their use. The power to altogether prohibit certainly includes the power to regulate.

MR. JUSTICE DAY delivered the opinion of the court.

These cases were tried together in the Circuit Court and were so considered in the Circuit Court of Appeals, and will be so disposed of here. In No. 140, Josephine King brought her suit in the Superior Court of Habersham County, Georgia, to recover $10,000 against the Southern Railway Company for the wrongful death of her husband, killed while riding in a buggy at a crossing of the defendant's railway. The alleged negligence was the violation of a certain statute of the State of Georgia, in that the company failed to check and to keep checking

the speed of its train while approaching the crossing at which her husband was killed.

In case No. 141, the action was brought by Inez King by her next friend, Josephine King, in the same court, because of injuries received at the same time and place, and in alleged violation of the same statute. Both cases were removed to the United States Circuit Court for the Eastern Division of the Northern District of Georgia. Upon trial verdicts and judgments were rendered against the railroad company. These judgments were affirmed in the Circuit Court of Appeals for the Fifth Circuit. 160 Fed. Rep. 332; 87 C. C. A. 284. The cases were then brought here by writs of certiorari.

The Federal question presented concerns the validity of the statute of the State of Georgia for violation of which a recovery was had, it being the contention of the petitioner that the statute is in violation of the interstate commerce clause of the Federal Constitution, in that it is an illegal burden upon and a regulation of interstate commerce. This statute is found in § 2222 of the Civil Code of Georgia, and reads as follows:

"There must be fixed on the line of said road, and at the distance of 400 yards from the center of each of such road crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof so as to stop in time should any person or thing be crossing said track on said road."

It has been frequently decided in this court that the right to regulate interstate commerce is, by virtue of the Federal Constitution, exclusively vested in the Congress of the United States. The States cannot pass any law directly regulating such commerce. Attempts to do so have been declared unconstitutional in many instances,

and the exclusive power in Congress to regulate such commerce uniformly maintained. While this is true, the rights of the States to pass laws not having the effect to regulate or directly interfere with the operations of interstate commerce, passed in the exercise of the police power of the State in the interest of the public health and safety, have been maintained by the decisions of this court. We may instance some of the cases of this nature in which statutes have been held not to be a regulation of interstate commerce, although they may affect the transaction of such commerce among the States. In *Smith* v. *Alabama*, 124 U. S. 465, it was held to be within the police power of the State to require locomotive engineers to be examined and licensed. In *N. Y., N. H. & H. Railroad Co.* v. *New York*, 165 U. S. 628, a law regulating the heating of passenger cars and requiring guard posts on bridges was sustained. In *Lake Shore R. R. Co.* v. *Ohio*, 173 U. S. 286, it was held to be a valid enactment to require railway companies operating within the State of Ohio to cause three of its regular passenger trains to stop each way daily at every village containing over three thousand inhabitants. In *Erb* v. *Morasch*, 177 U. S. 584, it was held that a municipal ordinance of Kansas City, Kansas, although applicable to interstate trains, which restricted the speed of all trains within the city limits to six miles an hour, was a valid exertion of the police power of the State. In the case of *Crutcher* v. *Kentucky*, 141 U. S. 47, this court said:

"It is also within the undoubted province of the State legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and, generally, with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the

operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of Congressional regulations over the same subject, are free from all constitutional objections, and unquestionably valid."

On the other hand, it has been held to be an illegal attempt to regulate interstate commerce to require interstate passenger trains to stop at county seats when adequate train service had already been provided for local traffic. *C. C. C. & St. L. R. R. Co.* v. *Illinois*, 177 U. S. 514. In *Mississippi Railroad Commission* v. *Illinois Central Railroad Company*, 203 U. S. 335, it was held that orders of a state railroad commission which directed the stopping of interstate trains at certain local stations, where adequate transportation facilities had already been provided, was an unlawful attempt to regulate interstate commerce and repugnant to the Federal Constitution.

Applying the general rule to be deduced from these cases to such regulations as are under consideration here, it is evident that the constitutionality of such statutes will depend upon their effect upon interstate commerce. It is consistent with the former decisions of this court and with a proper interpretation of constitutional rights, at least in the absence of Congressional action upon the same subject-matter, for the State to regulate, the manner in which interstate trains shall approach dangerous crossings, the signals which shall be given, and the control of the train which shall be required under such circumstances. Crossings may be so situated in reference to cuts or curves as to render them highly dangerous to those using the public highways. They may be in or near towns or cities, so that to approach them at a high rate of speed would be attended with great danger to life or limb. On the other hand, highway crossings may be so numerous and so near together that to require interstate trains to slacken speed indiscriminately at all such

crossings would be practically destructive of the successful operation of such passenger trains. Statutes which require the speed of such trains to be checked at all crossings so situated might not only be a regulation, but also a direct burden upon interstate commerce, and therefore beyond the power of the State to enact.

It is the settled law of this court that one who would strike down a state statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution. *Tyler* v. *The Judges*, 179 U. S. 405; *Turpin* v. *Lemon*, 187 U. S. 51, 60; *Hooker* v. *Burr*, 194 U. S. 415; *Hatch* v. *Reardon*, 204 U. S. 152, 160.

In the case at bar the Federal question was sought to be raised by an amendment to the answer. The answer originally filed was general in its nature, and did not set up the defense of violation of the Federal Constitution. The amendment filed set up that the railroad company was engaged in interstate commerce, and at the time of the injury complained of was operating an interstate train, and, after setting up the statute of the State of Georgia for a violation of which the company was sued, averred that it was inoperative as to the defendant's train, because in violation of § 8, Article I, of the Federal Constitution, giving Congress the power to regulate commerce, and further stated:

"Your defendant further shows that the statute of Georgia is not a reasonable regulation under the police power of the State to secure the safety of passengers, but that the statute is a direct burden on and impedes the interstate traffic being done by this defendant, and impairs the usefulness of its facilities for such traffic.

"Defendant further shows that it is impossible to ob-

serve said statute and carry the mails as defendant is required to carry them under the contract it has with the Government; and it is likewise impossible to do an interstate business, and at the same time comply with the terms of said statute.

"Wherefore it says that said statute is inoperative as to it, and it should not be required to comply with the same on its interstate line of railroad.

"All which it stands ready to verify, and prays that it be hence discharged with its reasonable cost."

On oral demurrer to this amendment to the answer the same was held insufficient and it was dismissed. Petitioner's counsel further sought to raise the Federal question by an offer of proof at the trial by an engineer of the company, as follows:

"I expect to prove that between the South Carolina line and Atlanta there are practically one hundred road crossings, or between eighty-five and one hundred public road crossings; that the distance is one hundred and one miles; that the crossings in some localities are very close together, and within a few hundred yards of each other, and at others farther apart, but on the average making a crossing to the mile almost. We expect to show further, that to observe the statute and check and keep checking so as to have a train under control, and to stop should any person or thing be on the crossing, would consume from five to ten minutes for each crossing, dependent, of course, upon the weight and length of the train and the grade; but it would make an average of seven or eight minutes. We wish to show that this train was made up and known as No. 39, the vestibule train which runs from the city of Washington, through the States of Virginia, North Carolina, South Carolina and Georgia; that it was carrying passengers from one State to another, also carrying an express car with freight on it, from one State to another. We wish and expect to show that obedience

to that crossing act would hinder, and practically prevent, interstate business being done by the defendant railroad. We wish to show the conditions I have just stated all existed at the time this accident occurred, on the 11th of October, 1903."

This testimony was excluded and an exception was taken. It is apparent from this outline of the state of the record that when this testimony was offered there was no answer on file in the case under which it would be competent. A demurrer had been sustained to the amendment to the answer, and the case stood upon the complaint and the general issue filed by the defendant. It is elementary that the proof must conform to the allegations, and that without proper allegations testimony cannot be admitted. We are then remitted to the question, Did the court err in sustaining the demurrer to the amended answer? The Circuit Court of Appeals held, and we think correctly, that an inspection of that document shows that it did not contain a proper averment of the facts, which would show that the operation of the statute in controversy was such as to unlawfully regulate interstate commerce, and, therefore, deprive the railway company of its constitutional right to carry on such commerce unhampered by such illegal restrictions. The amended answer contains the general statement that the statute is in violation of the commerce clause of the Constitution, and a direct burden upon, and impedes interstate traffic and impairs the usefulness of defendant's facilities for that purpose; that it is impossible to observe the statute in carrying mails and in interstate commerce business. But these averments are mere conclusions. They set forth no facts which would make the operation of the statute unconstitutional. They do not show the number or location of the crossings at which the railway company would be required to check the speed of its trains so as to interfere with their successful operation. For aught that appears

as allegations of fact in this answer the crossing at which this injury happened may have been so located and of such dangerous character as to make the slackening of trains at that point necessary to the safety of those using the public highway, and a statute making such requirement only a reasonable police regulation, and not an unlawful attempt to regulate or hinder interstate commerce. In the absence of facts setting up a situation showing the unreasonable character of the statute as applied to the defendant under the circumstances, we think the amended answer set up no legal defense, and that the demurrer thereto was properly sustained.

The learned counsel for the plaintiff in error insists that under the decisions in Georgia, in the absence of a special demurrer requiring a more particular statement, the answer was sufficient. It is enough to say that we have examined those decisions and think that they do not indicate a departure from the general rule that a pleading must state facts and not mere conclusions, and that the want of definite allegations essential to a cause of action or defense renders a pleading subject to demurrer.

We find no error in the judgment of the Circuit Court of Appeals, and the same is affirmed in both cases.

Affirmed.

MR. JUSTICE HOLMES, dissenting.

The petitioner set up as a defense to these actions that the statute under which it was sued was such a burden on commerce among the States as to violate § 8, Art. I, of the Constitution of the United States—a pure issue of law. If in order to try this issue intelligently it was necessary to take evidence of facts, I think the court was bound to hear such evidence, even without any specific allegation of the facts that would maintain it, as it is the court's duty to know and to declare the law. But I

leave that question on one side because the petitioners did not stop with the naked proposition, but alleged further that "it is impossible to observe said statute and carry the mails as the defendant is required to carry them under the contract it has with the Government; and it is likewise impossible to do an interstate business, and at the same time comply with the terms of said statute." These are pure allegations of fact. They mean on their face that the requirement that the engineer at every grade crossing should have his train under such control as to be able to stop if necessary to avoid running down a man or wagon crossing the track requires such delays as to prevent or seriously to interfere with commerce among the States. They refer to physical conditions and to physical facts; they can refer to nothing else. I think it obvious that they mean that the crossings are so numerous as to make the requirement impracticable, since I can think of nothing but the number of them that would have that effect.

The statement may be called a conclusion, but it is a conclusion of fact, just as the statement that a certain liquid was beer is a conclusion of fact from certain impressions of taste, smell and sight. If the objection to the pleading had been that more particulars were wanted, although, for my part, I think it would have been unnecessarily detailed and prolix pleading to set forth what and where the crossings were, the pleading should not have been rejected, but the details should have been required. The petitioner showed that it was ready to give them by its offer of proof. But evidently the answer was not held bad on that ground. Presumably at least, as stated by the counsel for the petitioner, it was held bad on the ground taken by the Supreme Court of that State, that although the requirement was impracticable it was the law. *Central of Georgia Ry. Co.* v. *Hall*, 109 Georgia, 367, 369. See 160 Fed. Rep. 332, 337; *S. C.*, 87 C. C. A.

284, 289. For it is to be observed further that the facts involved were public facts, and that although the court might not take notice of the precise situation of particular crossings it well might take notice, as the Supreme Court of Georgia seems to have taken notice in the case just mentioned, that they were numerous. See *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 638, and for many cases Wigmore, Ev., §§ 2575, 2580. 16 Cyc. 862. 17 Am. & Eng. Ency. of Law, 2d ed., 904. Again, if any merely technical objection had been thought fatal to the defense, the petitioner undoubtedly would have met it by a further amendment to its plea.

It seems to me a miscarriage of justice to sustain liability under a statute which possibly, and I think probably, is unconstitutional, until the facts have been heard which the petitioner alleged and offered to prove. I think that the judgment should be reversed.

I am authorized to say that Mr. Justice WHITE concurs in this dissent.